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that it is.

Of course, if Smith were overruled, my claim would remain true; we would, then, simply swap the Discrimination Schema for the Liberty Schema as the basic schema for free exercise.

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As for Residential Picketing, that is drawn directly from the Court's decision in Carey v. Brown, n376 and illustrates an important strand of the free speech case law: cases where the unconstitutional rule prohibits actions bearing a conjunction of two or more properties (such as residential picketing plus non-labor speech), even though a broader rule formed by deleting one of these properties would not be unconstitutional. The Mosley case n377 and the majority opinion in R.A.V. provide further examples of this puzzling, but significant part of First Amendment jurisprudence. n378

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n376. 447 U.S. 455 (1980) (holding unconstitutional, under Free Speech and Equal Protection Clauses, statute that prohibited residential picketing but exempted labor picketing).

n377. See Police Dept. v. Mosley, 408 U.S. 92 (1972) (striking down, under Free Speech and Equal Protection Clauses, rule prohibiting picketing near school except peaceful labor picketing).

n378. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391-96 (1992) (striking down ordinance prohibiting hate speech, as content- and viewpoint-discriminatory, despite assumption that ordinance had been narrowed to cover only "fighting words"). See generally Kagan, supra note 216, at 32-45, 39 (surveying this portion of free speech case law, viz., "content-based underinclusion": "the question [in such cases] is whether the government may voluntarily promote or protect some (but not all) speech on the basis of content, when none of the speech, considered in and of itself, has a constitutional claim to promotion or protection").

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The Liberty Schema cannot account for Alcohol, Animal Sacrifice, or Residential Picketing. In order to subsume the rules in these stylized cases under the Liberty Schema, we would need to identify appropriate subclasses of liberties that the rules encompassed without sufficient reason. But what subclasses would those be? The Equal Protection Clause is not standardly defended as delineating liberties - it protects blacks, women, and men from discriminatory rules; it does not protect actions by blacks, by women, or by men n379 - and in any event the puzzle would remain that a rule prohibiting the purchase of alcohol by blacks (or women or men) between the ages of eighteen and twenty-one can be cured by extending the prohibition to all persons in that age group. n380 If the initial rule went awry by including within its scope actions that, absent sufficient reason, persons should be free to perform, then extension would not (normally) n381 constitute a moral improvement. Given the structural isomorphism between equal protection and free exercise, the same

points can be made about free exercise [*115] rights. In Smith, the Court decisively rejected the proposition that the Free Exercise Clause delineates a class of liberties in the sense required by the Liberty Schema; relatedly, it is clear post-Smith that a rule prohibiting "the killing of animals for religious purposes" could be cured by replacing it with a prohibition against "the killing of animals for any purposes, except by a licensed producer of food." Finally, what makes a case like Residential Picketing puzzling, for free speech purposes, is that this case is structurally distinct from Flag Desecration and Child Pornography, and structurally similar to Alcohol and Animal Sacrifice. n382 There is sufficient reason to justify prohibiting the class of speech acts, "picketing a residence"; indeed, the Court determined precisely that in Frisby v. Schultz, where it upheld a general prohibition on residential picketing over First Amendment challenge. n383 But if this is true, then it should also (normally) be true that no First Amendment liberties are violated by prohibiting any proper subclass of the Frisby class, particularly the subclass "picketing a residence by non- labor speakers."

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n379. See supra section II.B (surveying theories of equal protection).

n380. See Craig v. Boren, 429 U.S. 190, 210 n.24 (1976): See generally Candace Kovacic, Remedying Underinclusive Statutes, 33 Wayne L. Rev. 39, 40-46 (1986) (noting and discussing proposition that rules violating equal protection, or equality guarantees of statutory law or state constitutional law, can be cured through nullification or extension).

n381. I say "normally" to leave open the unusual scenario where broadening a rule that violates the Liberty Schema has the effect of strengthening the moral reasons for prohibiting the liberties that fall within the rule's scope, and thereby tips the moral balance in favor of their prohibition. See supra text accompanying note 333 (noting this possibility).

n382. It is this puzzle that, in part, explains the flurry of scholarly reactions to the R.A.V. decision. See Akhil Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124 (1992); Kagan, supra note 216; Elena Kagan, Regulation of Hate Speech and Pornography after R.A.V., 60 U. Chi. L. Rev. 873 (1993); Symposium, Hate Speech after R.A.V.: More Conflict Between Free Speech and Equality?, 18 Wm. Mitchell L. Rev. 889 (1991); Laurence Tribe, The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice, 1993 Sup. Ct. Rev. 1.

n383. See Frisby v. Schultz, 487 U.S. 474 (1988).

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I suggest that Alcohol, Animal Sacrifice, and Residential Picketing should instead be explained by the following schema.

The Discrimination Schema

A rule the predicate of which contains some "morally irrelevant" property I of actions - that is, the rule expressly sets forth property I in delineating the actions that persons are obliged not to perform (or to perform), and that state officials are authorized to sanction - may have the wrong predicate.

There may be sufficient reason, all things considered, to narrow the rule, or to extend it, or even to replace the predicate with a different but coextensive act-description. If so, constitutional reviewing courts should invalidate the rule. "Morally irrelevant" properties are properties such that (1) some moral criterion in the Bill of Rights is best understood to stand for the proposition that (2) an action's having that property does [*116] not, at least in a certain way, increase the moral case for sanctioning or prohibiting it. n384

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n384. This schema could be broadened to include facially neutral rules that are motivated by a discriminatory purpose, see Personnel Admr. v. Feeney, 442 U.S. 256, 271-80 (1979) (stating that such rules trigger heightened equal protection scrutiny) - for example, by understanding "discriminatory purpose" as the intention of legislators, in enacting the neutral rule, to match the extension of some rule having irrelevant property I in its predicate. For simplicity, however, I will not broaden the schema in this way.

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Note a few points about this schema. First, and most importantly, I intend it to provide a unified account of the equal protection case law, the (post-Smith) free exercise case law, and the free speech case law epitomized by Residential Picketing. The basic idea is that an actor's race, his or her gender, his or her religion, and the viewpoint he or she expresses, is "morally irrelevant," at least in a certain way. Black persons and women are not moral inferiors to white men, and white men are not moral superiors to black persons and women. For none is it the case that, by virtue of his or her race or gender, his or her well-being counts for less or more. (Thus for none is it the case that his or her actions are the actions of a moral inferior or superior, and therefore more or less properly coerced or sanctioned.) The "moral irrelevance" of race and gender in this fundamental sense - what Dworkin calls the moral right to "equal concern and respect" n385 - has been a central theme in scholarship about the Equal Protection Clause. n386 My suggestion is that we might plausibly develop similar notions of "moral irrelevance" for the Free Exercise and Free Speech Clauses. At the very minimum, these clauses mean that the actions of a religiously-motivated actor are not morally worse, qua his religious motivation, and similarly that the actions of an actor expressing viewpoint V rather than W are not morally worse, qua his expression of V. Anyone who [*117] adopts a more robust construal of the clauses - for example, as delineating "liberties" in the sense sketched out by the Liberty Schema, as protecting us from religious strife, or as guaranteeing a viewpoint-balanced public debate - can surely agree to this minimum claim.

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n385. See Dworkin, Taking Rights Seriously, supra note 1, at 272-78, 273 ("[Government] must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.").

n386. Besides Dworkin, see, e.g., Brest, supra note 238, at 6 ("Race-dependent decisions are irrational insofar as they reflect the assumption that members of one race are less worthy than other people."); Ely, supra note 253, at 82 (stating that the Equal Protection Clause "precludes a refusal to

represent [minorities], the denial to minorities of what Professor Dworkin has called 'equal concern and respect' " (footnote omitted)); Fiss, supra note 108, at 155 ("Blacks are what might be called a specially disadvantaged group, and I would view the Equal Protection Clause as a protection for such groups."); Koppelman, supra note 219, at 9 ("Stigmatized social status and the concomitant withholding of respect are ... the central evil the [antidiscrimination] project seek to remedy ...."); Sunstein, supra note 304, at 338-46 (arguing that the Equal Protection Clause incorporates anti-caste principle). Obviously, these authors develop specific theories of equal protection doctrine that are quite diverse - and indeed some develop theories focused upon race discrimination, rather than gender discrimination, see Ely, supra, at 164-70 - but the point remains that the moral equality of group Z (races or genders or other groups) is an animating principle behind each author's defense of an equal-protection doctrine protecting group Z.

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Note, however, that the Discrimination Schema is quite careful not to define precisely what "moral irrelevance" means. For example, it is indisputable that race and gender are "morally irrelevant," in the sense of not constituting persons as inferior or superior, and further that moral irrelevance in this foundational sense is part of the best understanding of the equal protection guarantee set forth in the Fourteenth Amendment. Whether race and gender are also "morally irrelevant" in the further sense that (1) these characteristics are never correlated with proscribable characteristics, n387 (2) racist and sexist preferences have no weight, within a utilitarian calculus, n388 or (3) the needs and capacities of men and women are no different, are matters for debate. Relatedly, the schema does not say that race or gender are "morally irrelevant" in the sense of never being properly set forth by a rule. That is clearly not the case for gender, in the Court's view; the Court has upheld gender- discriminatory laws. n389 Someone who wants wrongful gender-discriminatory rules to be invalidated, by constitutional reviewing courts, is not committed to the claim that rules should never discriminate by gender. All he is committed to is some, more foundational, sense of "moral irrelevance" such that the rightness or wrongness of gender discrimination is an appropriate issue for constitutional courts to consider.

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n387. See Brest, supra note 238, at 6 (claiming possible statistical correlation between race and legitimate bases for government regulation).

n388. See Scarre, supra note 46, at 162-66 (arguing that a debased preference, paradigmatically a preference to harm someone whom the holder takes not to be equally human, is not constitutive of happiness and therefore does not count within a utilitarian calculus).

n389. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding draft registration of men but not women); Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding gender- discriminatory statutory rape law); Califano v. Webster, 430 U.S. 313 (1977) (upholding gender-discriminatory provision of Social Security Act).

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Finally, the schema is careful not to specify exactly why sufficient reason obtains to change the predicate of some rule setting forth an irrelevant property I. Most simply: if a rule prohibits actions with properties I & W, and I neither serves in any way to make actions worse, nor correlates in any way with wrong-making properties, then there is presumably sufficient moral reason to narrow or extend the rule (with the moral choice of narrowing vs. ex [*118] tending depending on the wrongfulness of W alone). But the schema also leaves open the possibility that a rule-predicate setting forth I should be changed even if I is correlated with wrong-making properties. The Court in Craig v. Boren apparently did just this, striking down Oklahoma's law prohibiting the sale of low-alcohol beer to men between the ages of eighteen and twenty-one, even though Oklahoma's statistics suggested that men were significantly more likely to drink and drive than women. n390 One might explain Craig by appealing to the notion of stigma, or to the exemplary effects of gender-discrimination; one might say that, even though gender is a good proxy for Oklahoma, the Oklahoma law would serve as an (unfortunate) example that would encourage unjustified discrimination by other actors. The conditions under which the state properly relies upon race, gender, religion, or viewpoint as the basis for regulating actions is a matter for substantive debate within the jurisprudence of equality, religion, and speech. I mean the Discrimination Schema to anticipate, not to resolve such debates.

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n390. See Simons, supra note 231, at 479 n.107 (discussing Craig) ("In the state's view, statistics indicated that 2% of the males posed the harm [drunk driving], but only 0.18% of the females. If the statistics were valid (and there were some serious problems with them) they indicated a ten fold geometric differential harm ....").

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How else might cases like Alcohol, Animal Sacrifice, and Residential Picketing be explained, within the Derivative Account, if not by appeal to the Discrimination Schema? One alternative is to describe particular, unwanted outcomes, one or another of which the rules in these cases allegedly produce; these rules stigmatize women or blacks, exacerbate the distributive injustice already suffered by low-status groups, skew public debate, ignite religious strife, and so on, or so the outcome theorist might argue. n391 The difficulty here is as follows: unless the outcome theorist can produce outcomes that are essentially connected to a rule's using particular, "suspect" predicates such as race, gender, religion, or viewpoint, she has not satisfactorily explained the case law. Stigma is this kind of outcome, but only works for Alcohol. The further outcomes I have listed - and others that plausibly fit the moral concepts of equal protection, free speech, and free exercise - are not essentially connected to particular rule-predicates. A race- neutral law can have a disproportionate impact on blacks; n392 a [*119] viewpoint-neutral law can have a disproportionate impact on speakers with a particular viewpoint; n393 a neutral law that burdens one group's religious practices might well be perceived by that group as unfair. n394

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n391. See supra text accompanying notes 304-07 (noting possible outcomes, to ground possible rule-validity schema within constitutional law).

n392. See Washington v. Davis, 426 U.S. 229 (1976) (upholding race-neutral qualifying exam, which had disproportionate impact upon blacks); Personnel Admr. v. Feeney, 442 U.S. 256 (1979) (upholding gender-neutral civil service preference for veterans, which had disproportionate impact upon women).

Similarly, a race-neutral law can lead to the unequal treatment of blacks and whites, within a Tusmman/tenBroek type theory. Imagine that the law is both irrational, relative to valid purposes, and has a disparate impact upon blacks.

n393. A plausible example is United States v. O'Brien, 391 U.S. 367 (1968) (upholding prohibition on destruction of draft cards), which presumably had a disproportionate impact upon anti-war speech. The outcome theorist might respond that courts are epistemically poorly suited to determine whether neutral laws skew debate; but unless they are epistemically well- placed to distinguish between speech-targeted laws that do and do not skew debate (which seems implausible, given the initial premise) this outcome theory turns out to be both extensionally equivalent to my Discrimination Schema, and a cruder explanation of the jurisprudence. Consider a case such as R.A.V.; it is very hard to believe that an imbalance in the class of viewpoints expressed by speakers of "fighting words" is a constitutionally problematic outcome as such. Rather, a morally suboptimal rule that picks out a viewpoint-based subclass of "fighting words" is unconstitutional because its predicate employs the morally irrelevant property of viewpoint. (How could such a rule be morally suboptimal? If, for example, the utterance of fighting words is truly harmful, extending the rule to include all speakers of fighting words would presumably constitute a moral improvement).

n394. A plausible example is Smith itself. See Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (upholding sanctions against Native Americans who used peyote for sacramental purposes).

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The reader might object that the case law is crazy; any decent rule-invalidity schema, she might claim, will identify certain important types of actions (liberties) that persons should be free to perform, or certain bad outcomes that there is strong moral reason to avoid, but not certain types of descriptions under which rules wrongly regulate actions. Yet I fail to see the craziness. A given rule-invalidity schema must, at a minimum, be one that courts are epistemically and otherwise competent to enforce. n395 Further, it must be tied to the moral criteria set forth in the Bill of Rights. So we can argue about which liberties are thus tied (liberty of contract? liberty of religion?), and which act-properties are thus tied (viewpoint? religion? race?). But it is not crazy to think that the Bill of Rights, besides protecting certain liberties or safeguarding against certain outcomes, also stands for certain moral propositions: the propositions that particular natural or conventional properties of actors and actions do, or do not, have moral relevance, in various ways. To recur to Dworkin: the Equal Protection Clause might guarantee, not equal treatment, but equal concern and respect. n396 It might require, not that blacks and whites be treated equally well, but that governmental decisions not be grounded upon the proposi [*120] tion that blacks and whites are morally different simply by virtue of their race. Unless the concept of discrimination is constitutionally crazy, my schema and the case law are not. The concept of a rule or decision being discriminatory just is the concept of the decision having a particular unwarranted basis, grounds, or predicate, rather than having a particular unwarranted outcome. n397

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n395. See Adler, supra note 4, at 771-80 (arguing that epistemic and other institutional defects are grounds to limit judicial enforcement of constitutional criteria).

n396. See Dworkin, Taking Rights Seriously, supra note 1, at 227 (distinguishing between these two versions of "equality").

n397. See Brest, supra note 238, at 1 ("By the 'antidiscrimination principle' I mean the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected.").

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A rule must produce some kind of unwarranted outcome to satisfy the Discrimination Schema; there must be sufficient reason to change the predicate of the rule in some measure. But my schema is not tied to particular outcomes; it is tied, in a way that fits the case law, to a rule's use of "irrelevant" predicates such that, in the end, the rule somehow goes awry. The account is perched, as it were, between outcome theories and process theories of discrimination. n398 Outcome theories are problematic, for the reasons I have just adduced. Process theories are even worse. At best the process theorist might try to defend the Direct Account, as against the Derivative Account. But this is morally dilutive, for reasons I have already explained. And once she moves to the framework of the Derivative Account - once she concedes that reviewing courts are essentially concerned with the repeal or amendment of rules, not the treatment of particular litigants - the process theory becomes even weaker. A rule such that (a) false beliefs figured in the enactment of the rule, but (b) the rule-predicate turns out, coincidentally, to be morally perfect, is not a rule that reviewing courts should repeal or amend. It is a rule that courts should affirm, insofar as courts can reliably determine the rule's perfection! False legislative beliefs should matter to reviewing courts just insofar as these beliefs lead legislatures to enact flawed outcomes, or partly constitute flawed outcomes (as in the case of stigma), or evidence flawed outcomes. They do not matter as such.

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n398. See Koppelman, supra note 219, at 16 (distinguishing between these two types of theories).

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The only way around this is to argue that process is intrinsically valuable for groups, and that false beliefs about these groups hinders their political participation. This is one of the variants of process theory, which I briefly mentioned above. n399 But this sort of participation-enhancing process theory has the deeply counterintuitive consequence that, if blacks and whites in a segregated society [*121] share prejudices against blacks, and together participate in the process of enacting a racially discriminatory law that, morally, ought to be changed, no violation of the Equal Protection Clause has ensued. A racially discriminatory rule can be morally wrong, and constitutionally awry, independent of black participation. n400

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n399. See supra text accompanying notes 251-55.

n400. More precisely, this objection is problematic for an intrinsic-process theory that purports to be an exclusive theory of constitutional antidiscrimination norms. What about developing such a theory as a supplement to my Discrimination Schema, along the following lines: a morally optimal rule, such that prejudices among the rule-formulators hindered (intrinsically valuable) participation by disfavored groups in the rule-formulation process, is unconstitutional and should be invalidated? Whatever the independent merits of this supplementary theory, it is not a particularly good account of the case law insofar as that relies upon judicial assessment of rule-predicates rather than direct historical evidence of the beliefs that figured in the formulation of rules - for if a rule-predicate is morally optimal, the fact that it contains a morally irrelevant property I is little evidence of a prejudiced rule-formulation process.

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3. Rights for Wrongdoers

Let us now return to the puzzle that my stylized cases are meant to exemplify, and that the Direct Account proved unable to resolve: How can it violate X's constitutional rights to sanction him for performing a particular action A, or to coerce him not to perform that action, pursuant to rule R, even if that very action is wrongful and thus properly sanctioned or coerced pursuant to a different rule?

An initial point bears mention here. Nothing in the Derivative Account itself entails that the only persons who can secure the judicial invalidation of sanction-backed, duty-conferring rules are persons who secure the invalidation of their own sanctions or duties. To say that some rule R "violates X's constitutional rights," within the Derivative Account, simply means that (a) the rule R fails a constitutional rule-validity schema (such as the Liberty Schema, the Discrimination Schema, or some other); such that (b) the court properly invalidates R, by issuing a revised rule R<prime> (either a narrowing amendment, or a wholesale repeal, or even an extension n401), at the instance of X. X might, in theory, be just a concerned citizen. n402 Or X might be a victim of wrongdoers, who hopes to broaden the scope of R. n403 Or X might be an actor sanctioned pursuant to R, which the Court partly invalidates, but without invalidating the por [*122] tion of the rule applicable to X. n404 These possibilities are not ruled out by the logic of the Derivative Account, itself. They may, to some extent, be ruled out by the standing component of Article III of the Constitution n405 - but this standing requirement is extrinsic to the Derivative Account, in the sense that a personal setback to X himself is, on the Derivative Account, no precondition for X's power to secure the judicial invalidation of a constitutionally invalid rule.

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n401. See Kovacic, supra note 380, at 40-46 (noting that courts frequently remedy benefit- conferring rules that violate equal protection by extending their coverage).

n402. But see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (rejecting, on standing grounds, challenge to administrative regulation despite statutory provision authorizing "any person" to bring suit).

n403. But see Linda R.S. v. Richard D., 410 U.S. 614 (1973) (holding that mother has no standing to seek broader scope of criminal prohibition against nonpayment of child support).

n404. Cf. Shapero v. Kentucky Bar Assn., 486 U.S. 466, 472-80 (1988) (holding that rule regulating direct-mail solicitation by lawyers violated commercial-speech test, and then separately considering whether claimant's own letter was "particularly overreaching," viz., whether that letter fell outside the properly-invalidated portion of the rule).

n405. See, e.g., Allen v. Wright, 468 U.S. 737, 750-52 (1984) (setting forth and explaining black-letter standing doctrine under Article III).

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I believe, in truth, that Article III does not require X to secure an improvement in her own legal position (that is, judicial relief from a sanction or duty) for a court to invalidate rule R at X's instance. n406 Whatever else standing requires, it does not require that. But I will not attempt to defend this view of standing, for the Derivative Account is, strictly, agnostic on the issue n407 - and, in any event, all of the constitutional cases in which the Court has invalidated sanction-backed, duty-conferring rules have been cases where the claimant's own legal position was improved. n408 This is the scenario that our stylized cases are meant to exemplify - the scenario in which X's sanction or duty pursuant to rule R violates her constitutional rights. On the Derivative Account, to say that means not merely that (a) the rule R fails a constitutional rule-validity schema (such as the Liberty Schema, the Discrimination Schema, or some other); and that (b) the court properly invalidates R, by issuing a revised rule R<prime> (either a narrowing amendment, or a wholesale repeal, or even an extension), at the instance of X; but that further (c) X's treatment (her sanction or duty) is not authorized by R<prime>. Why does (c) occur, in our stylized cases?

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n406. I say that, in part, because otherwise judicial nullification rather than extension of benefit-conferring rules also would violate Article III. See Kovacic, supra note 380, at 40-46 (noting that nullification sometimes chosen as remedy for benefit-conferring rules). But see Dorf, supra note 38, at 294 (claiming that "any constitutional challenge to a statute ... is as- applied in the sense that adjudication in federal court ... requires that the statute be applied to the litigant to create a case or controversy").

n407. This is not to say that the truth of the Derivative Account has no implications for standing doctrine. It is rather to say that standing limitations must be defended on grounds other than the nature of constitutional rights. This very fact - the fact that standing is extrinsic to the Derivative Account, by contrast with the Direct Account - has very important implications. I discuss those implications a bit more below. See infra text accompanying notes 573-86.

n408. I know of no counterexample. See infra note 426 and accompanying text.

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[*123] Take Flag Desecration as an example. A rule R provides that "no person shall desecrate a flag of the United States." X burns a flag, and in the course of doing so batters a bystander, commits arson, and pollutes the environment. She is sanctioned pursuant to R, and brings suit challenging the rule and, specifically, her sanction. Rule R is unconstitutional: it violates the Liberty Schema. So on the Derivative Account the reviewing court should repeal, narrow, or perhaps even extend R: it should issue a revision R<prime>. But what is R<prime>? And why doesn't it authorize X's sanction? Consider these possibilities:

- R<prime> might be a retroactive and prospective repeal of R. If so, X's sanction is not authorized by R<prime> (which has zero scope), and the court overturns X's sanction as part of its replacement of R with R<prime>. Flag Desecration is explained by the Derivative Account.

- R<prime> might be a prospective-only repeal of R. If so, X's sanction is authorized by R<prime> - R<prime> is identical to R for past actions such as X's - and the court does not overturn X's sanction as part of its replacement of R with R<prime>. Flag Desecration is not explained by the Derivative Account.

- R<prime> might be a retroactive and prospective amendment of R, to the following effect: "No person shall desecrate a flag of the United States, if in the course of doing so she commits trespass, battery, arson, or pollution." If so, X's sanction is authorized by R<prime>, and the court does not overturn that sanction as part of its replacement of R with R<prime>. Flag Desecration is not explained by the Derivative Account.

In short, to explain the stylized cases, we need a view about R<prime> - that is, a remedial view. We need a view about the kind of revisions to an unconstitutional rule that a reviewing court should promulgate, once the court has determined that the rule fails a rule-validity schema.

A remedial view will have two components. One component, as the above examples suggest, is temporal. We need to decide whether the amendment, extension, or repeal of R should be solely prospective, retrospective as well as prospective, solely retrospective, or perhaps some esoteric combination (for example, prospective in general, retrospective for X as a incentive payment). This temporal structure might be the same across rule-validity schema; or it might vary from schema to schema. I noted earlier that the concept of liberty, and therewith the Liberty Schema, is essentially [*124] forward-looking. n409 A rule violates the Liberty Schema by coercing future actors not to perform some subclass of liberties such that, all things considered, the actors should be free to perform these. This cuts in favor of a prospective-only view of R<prime>, at least for the Liberty Schema. On the other hand, an incentive argument may sufficiently explain why, for some X who is sanctioned pursuant to a rule that (solely) fails the Liberty Schema, X's own sanction should be overturned (and not just X's prospective duty, along with everyone else's). n410

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n409. See supra text accompanying notes 211-13.

n410. See Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1083 & n.172 (1997) (noting incentive argument for retroactivity of judicial remedies).

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It is well beyond the scope of this article to develop a specific theory of the temporal structure of judicial remedies in constitutional cases. It is plausible - although I will not develop or defend a firm position on this - that the correct theory makes remedies at least retroactive to the constitutional litigant. No less an authority than Ronald Dworkin has sketched out the pragmatic grounds for adjudicative retroactivity.

If the pragmatist judge thinks the matter through, he will ... reject [the] technique of "prospective-only" rulemaking, except in very special circumstances. For he will realize that if this technique became popular, people who might benefit from new, forward-looking rules would lose their incentive to bring to court novel cases in which these new rules might be announced for the future. People litigate such cases (which is both risky and expensive) only because they believe that if they succeed in persuading some judge that a new rule [for our purposes, a new ruling that a statute, etc., is unconstitutional] would be in the public interest, that new rule will be applied retrospectively in their own favor. n411

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n411. Ronald Dworkin, Law's Empire 156 (1986).

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Further, the Discrimination Schema - in my view a central part of constitutional law, along with the Liberty Schema - is not essentially prospective. The pattern of sanctions produced by a law prohibiting "the purchase of alcohol by men between eighteen and twenty-one" or "the sacrifice of animals for religious purposes," or "residential picketing by non-labor groups" is morally suboptimal. Such a pattern obtains because state officials have followed a decision rule that overweights the moral relevance of gender, religion, or speech. And the same can be said about the pattern of sanctions produced by Abortion, Child Pornography, and Flag Desecration, to the extent the rules here are seen to fail both the Lib [*125] erty Schema and the Discrimination Schema. n412 Finally (although this doctrinal point may well rest, in part, upon a robust view of adjudication inconsistent with the Derivative Account) it is now Supreme Court doctrine for both criminal and civil cases that the federal courts cannot announce legal rights nonretroactively. n413 For all these reasons, it is likely or at least plausible that the remedies in our stylized cases will be retroactive; there will be no temporal bar to overturning X's sanction, assuming his action A falls outside the predicate of R<prime>.

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n412. See supra note 369 (discussing possibility of double violation).

n413. See Fisch, supra note 410, at 1059-63 (summarizing doctrine).

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But will it? The second component of the remedial view is predicative: a view about the appropriate judicial revision to the predicate of R. n414 The possibilities, here, are myriad but the two most salient alternatives are as follows. First, the court might facially invalidate R: it might issue an utterance which renders R a nullity (within the proper temporal range). n415 This could be a permanent nullification of R. More plausibly, though, the court's facial invalidation of R will leave open the possibility that the body responsible for issuing authoritative interpretations of R (be it an agency or a state supreme court) can cure R's constitutional defects, and revive its legal authority, through a narrowing interpretation. n416 Second, the court might optimally revise R. The court might promulgate what it takes to be the morally optimal revision to R, whether that be a facial invalidation, a partial invalidation, an extension, a partial invalidation plus a partial extension, or a predicate-change without a scope change - subject again perhaps to subsequent re-revision by R's authoritative interpreter. n417

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n414. The classic discussion of this remedial issue remains Robert Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 82-106 (1937).

n415. See Dorf, supra note 38, at 251-81 (discussing Court's actual use of facial invalidation in various contexts, including free speech, privacy, and equal protection).

n416. See Fallon, supra note 83, at 854-55 ("All that the Supreme Court says when it holds a state statute overbroad, and all that it could say, is that the statute as authoritatively construed by the state courts prior to the Supreme Court's judgment is too sweeping to be enforced through the imposition of civil or criminal penalties. Following the Court's decision, it remains within the discretion of state authorities to seek limiting constructions of the affected statute in state court actions for declaratory judgments."). This proviso is irrelevant where the federal court is, itself, the body responsible for authoritatively construing the statute, see id. at 853 n.3, although it is seriously questionable whether - given the Court's decision in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) - that is ever the case. See, e.g., Dan Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469 (1996) (arguing for Chevron deference to Department of Justice with respect to federal criminal statutes).

n417. I stress that this is a salient possibility - the purest alternative to a facial- invalidation view. Obviously, there are intermediate possibilities between facial invalidation and optimal revision, for example, that a court should either (1) promulgate a standard type of narrowing amendment to R, if such amendment cures R; or (2) failing that, facially invalidate R only if that is a moral improvement over R. Something like this intermediate possibility

seems, in fact, to map onto current remedial practices within the free speech case law. The Court frequently relies here on facial invalidation, see infra note 425, but it does not do so universally, see id. (citing partial invalidations), and the requirement of "substantial" overbreadth, see Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973), might be understood to map onto (2). See also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 882-911 (1970) (arguing for facial invalidation of substantially overbroad rules, except where there exists a clear, per se category within free speech doctrine such that a judicial narrowing of the rule to exempt that category cures the rule).

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[*126] The moral considerations in favor of the facial-invalidation view go to the epistemic benefits of specialization. Society is made better off, morally, by having different legal bodies specialize in different types of moral questions. n418 Plausibly, then, federal constitutional courts should only be legally responsible for deciding whether a rule fails some rule-validity schema grounded in the Bill of Rights; while legislatures, agencies, and other bodies responsible for enacting or authoritatively interpreting rules should have the task of choosing between alternative rules, all of which satisfy the constitutional rule-validity schema. n419 For example, the advocate of this view will say, it is not the proper judicial role to decide whether the rule in Alcohol ("no black person between eighteen and twenty-one may purchase alcohol") should be extended to "no person between eighteen and twenty-one may purchase alcohol," or repealed (leaving intact a background prohibition on alcohol-purchase by all persons under eighteen). Both of these alternatives satisfy the Discrimination Schema and Liberty Schema, as does the alternative of repealing both the rule and the background prohibition; only one of these three is morally optimal, but that is not a constitutional question. Rather, the court should facially invalidate the racially discriminatory no-alcohol rule, leaving the choice between the various racially neutral alternatives to the legislature or agency. A constitutional reviewing court has no reliable basis to make this latter choice - or so the advocate of facial invalidation will argue.

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n418. Cf. supra text accompanying notes 169, 282-86 (discussing epistemic basis for legal authority).

n419. For a recent and exemplary expression of this kind of view, see Reno v. ACLU, 117 S. Ct. 2329, 2350-51 (1997) (facially rather than partly invalidating law restricting speech on internet, and arguing that to do otherwise would amount to an "invasion of the legislative domain," absent a "clear line" for redrafting the statute evident from its text or legislative history).

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The moral considerations in favor of the optimal-revision view go to the moral losses that ensue from facial invalidation of rules. n420 [*127] Facially invalidating the rule in Alcohol would leave persons between eighteen and twenty-one free to purchase alcohol; facially invalidating the rule in Residential Picketing would leave householders at the mercy of picketers; facially invalidating the rule in Child Pornography would leave child pornographers free to exploit children; facially invalidating the rule in

Abortion would leave viable fetuses unprotected. These considerations are particularly pressing where the morally optimal revision of an unconstitutional rule is, or seems to be, a relatively small revision relative to the set of actions covered by the rule. For example, the morally optimal revision of a rule that picks out nonexpressive properties of actions, but violates the Liberty Schema by encompassing speech- acts, is normally to exclude speech from the rule rather than to repeal the rule entirely. No one wants to get rid of the trespass laws, n421 not even those who want proselytizers and political protesters to be free to trespass.

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n420. See, e.g., Brockett v. Spokane Arcades, 472 U.S. 491, 501-07 (1985) (stating that partial, rather than facial invalidation is normally the proper judicial response to an unconstitutional statute); Stern, supra note 414, at 101 ("[In remedying unconstitutional statutes] the Court should look to the policy sought to be effectuated by the statute and decide whether that policy will be more nearly attained by partial application or by complete nullification of the law.").

n421. See Alexander, supra note 7, at 552.

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It is, again, beyond the scope of this article to choose among the facial-invalidation view, the optimal-revision view, and something in between. The issue merits an article on its own. Among other difficulties, I should note that the appropriate view may well depend on the constitutional clause or rule-validity schema at stake; n422 on the strategic incentives of actors who can secure facial, as opposed to partial invalidations of rules; n423 and on the existence of a statutory or regulatory severability clause for R (guiding its revision in the event R is held unconstitutional). n424 Let me merely suggest here that the facial-invalidation view is plausibly the correct one for a substantial portion of the rules that reviewing courts review. (This suggestion, like my temporal suggestion, is borne out by the Court's actual practices: many, perhaps even most of the cases in which the Court has sustained claims of constitutional right, against conduct-regulating rules, have been facial invalidations rather than [*128] partial invalidations. n425 And the Court has never, to my knowledge, extended a conduct-regulating rule. n426) To the extent that the facial-invalidation view holds good, we have a simple explanation of the stylized cases. These rules go morally awry, breaching constitutional rule-validity schema. The reviewing court's legal role is to repeal (facially invalidate) a rule that does so, rather than changing the rule's predicate to what the court takes to be morally optimal. In particular, it is not the court's legal role to decide whether the optimal cure of R encompasses X's particular action A. Therefore, X has the legal right to trigger the complete repeal of rule R and therewith the invalidation of his own sanction, quite independent of whether X's action happens to be wrongful under another description.

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n422. See supra note 144 (discussing Court's reliance on as-applied challenges within free speech, but not equal protection case law).

n423. Cf. Jerry Mashaw, Greed, Chaos and Governance 177 (1997) (noting, in administrative-law context, that parties may use preenforcement review to thwart necessary rulemaking, given the cheapness of preenforcement litigation as opposed to compliance).

n424. See Stern, supra note 414, at 100-01. For recent discussions of severability clauses, see Mark Movsesian, Severability in Statutes and Contracts, 30 Ga. L. Rev. 41 (1995); John Copeland Nagle, Severability, 72 N.C. L. Rev. 203 (1993); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945 (1997).

n425. To check the frequency of facial invalidation, I identified and examined the cases during the 10 Terms from 1987-88 to 1996-97 in which the Court invalidated conduct-regulating rules against private parties, under the Free Speech Clause (leaving aside vagueness), Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause. I identified 23 such cases. Fourteen, a majority, are best categorized as facial invalidations (i.e., cases where the Court invalidated an entire provision or sentence, an entire textually-defined portion thereof, or some other block of canonical text). See Reno v. ACLU, 117 S. Ct. 2329 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Ladue v. Gilleo, 512 U.S. 43 (1994); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Lee v. International Socy. for Krishna Consciousness, 505 U.S. 830 (1992); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); Hodgson v. Minnesota, 497 U.S. 417 (1990); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989); Riley v. National Fedn. of the Blind, 487 U.S. 781 (1988); Boos v. Barry, 485 U.S. 312 (1988).

Nine, a minority, are best categorized as partial invalidations. See Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Ibanez v. Florida Dept. of Bus. & Profl. Regulation, 512 U.S. 136 (1994); Edenfield v. Fane, 507 U.S. 761 (1993); City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993); United States v. Eichman, 496 U.S. 310 (1990); Peel v. Attorney Registration & Disciplinary Commn., 496 U.S. 91 (1990); Texas v. Johnson, 491 U.S. 397 (1989); Shapero v. Kentucky Bar Assn., 486 U.S. 466 (1988). Notably, all nine are free-speech cases.

Obviously, this is a small sample, and (even within this sample) categorizing judicial holdings as facial versus partial invalidations involves some judgment, but the results still suggest that many, perhaps even most of the Court's constitutional decisions sustaining rights-claims against conduct-regulating rules are facial invalidations. I should stress that my definition of "facial" invalidation, here - invalidating an entire rule, on some kind of text-based individuation criterion - is considerably broader than the special definition appropriate for the notion of "facial" invalidation within the context of the Countermajoritarian Difficulty and other legislature-centered arguments for judicial restraint. See Adler, supra note 4, at 794 n.104.

n426. See Kovacic, supra note 380, at 42. Cf. Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (holding unconstitutional a state statute providing for sterilization of habitual criminals, under Equal Protection Clause, and remanding for state supreme court to decide whether to cure

unconstitutionality by extension or invalidation of statute); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (holding unconstitutional state rape and sodomy statutes exempting married persons and women, under Equal Protection Clause, and curing unconstitutionality by extension).

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[*129] Is this appeal to judicial role question-begging? No and yes. No, in the following sense. In this article, I have discussed various possible legal practices - various specific conceptions of the legal practice of judicial review. One possible practice is act-shielding: constitutional courts determine whether particular actions should be protected by legal shields and, if so, issue shielding orders. Another possible practice is rule-centered: constitutional courts determine whether particular rules should be invalidated and, if so, issue invalidation orders. The facial-invalidation practice is a specific variant of this latter, rule-centered view; the optimal-revision practice is another. As between these various possible practices, we can decide which one is morally optimal. Would a world in which courts follow Practice<1> be better or worse, morally, than a world in which they follow Practice<2>? I assume there are good arguments in favor of the rule-centered practice, since that is, in fact, ours; I further suggest that there are good arguments in favor of the facial- invalidation version of a rule-centered practice.

Let us assume these arguments are right. The facial-invalidation practice is morally optimal, as between the various review-practices. The Supreme Court, or some other body which possesses legal power to define the practice of judicial review, promulgates this one. It still remains an open moral question why a particular judge, faced with a particular litigant, should adhere to this legally binding (and, by hypothesis, morally optimal) practice. n427 This is just the problem of legal authority, in another guise. What if the particular judge is a moral expert, and knows that about himself, and further knows that X has done wrong, and finally knows that upholding X's particular sanction is more important morally than invalidating the particular rule R at stake, even though in general a (retrospective) facial-invalidation practice is morally optimal? Nothing in my moral arguments for the optimality of promulgating this practice guarantees that each and every participant in the practice in fact has conclusive, moral reason to adhere to it. How to generate moral reasons at the participant-level, from moral reasons at the practice-level, remains one of the deepest and most difficult questions of jurisprudence. I will not try to answer that question. What [*130] can be said is that, if our expert judge upholds X's sanction despite the official promulgation of a retrospective, facial-invalidation practice, the judge has acted illegally. He may have acted morally, but (if the facial-invalidation practice, by its terms, contains no moral escape clause) the judge has not honored X's legal rights.

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n427. See Schauer, supra note 58, at 128-34, 129 (discussing "asymmetry of authority": the existence of "a (good moral) reason for imposing" a rule does not, or may not, entail the existence of "a (good moral) reason for obeying" it); Larry Alexander & Emily Sherwin, The Deceptive Nature of Rules, 142 U. Pa. L. Rev. 1191 (1994) (discussing "asymmetry of authority" and concomitant use of "deception" by rule-formulator); see also Rawls, supra note 198, at 3 (distinguishing between moral justification for a general practice, and moral justification for a particular application of the practice).

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In short: I cannot show, and will not suggest, that particular judges, faced with particular litigants, always have conclusive moral reason to honor the litigant's legal rights. What I might show, and will suggest, is that it is plausibly morally best for litigants to have the following legal right: the legal right to trigger a retrospective facial invalidation of rules that fail constitutional rule-validity schema.

But what if this latter suggestion is wrong? The Supreme Court does not universally follow a facial-invalidation practice. Sometimes the Court partly invalidates rules instead of wholly repealing them; n428 and, albeit not in the case of conduct-regulating rules, the Court sometimes remedies an unconstitutional rule by extending the rule's scope. n429 I have synthesized these various alternatives, to a facial-invalidation practice, with the notion of an optimal-revision practice. Optimal revision, again, says this: the proper judicial remedy, upon a judicial determination that a rule R breaches one or another constitutional rule-validity schema, is to issue an utterance promulgating (if only temporarily, pending legislative or administrative action) a rule R<prime>, which the court takes to be the morally optimal revision to R.

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n428. See supra note 425.

n429. See Kovacic, supra note 380, at 40-46.

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If this practice (or something close to it) obtains, we will have a difficult time explaining Residential Picketing and Child Pornography. The optimal R<prime> in Residential Picketing is likely a rule that prohibits "residential picketing," rather than no rule at all; n430 the optimal R<prime> in Child Pornography is likely a rule that is tailored to cover obscene displays of naked children, rather than no rule at all. n431 Thus, in both these cases, the action A of our stylized X remains covered by the optimal revision R<prime>; it will not be the case that X's sanction should be overturned, as part of the judicial issuance of R<prime>. But the remaining cases can perhaps be explained, even on an optimal-revision view. The optimal revision R<prime> of the rule in [*131] Abortion is likely "no person may procure an abortion of a viable fetus except for maternal life or health" (or something narrower than that), not "no person may procure an abortion of a viable fetus except for maternal life or health, or an abortion of a non-viable fetus by means of coercive threats." The optimal revision R' of the rule in Flag Desecration is likely a repeal, as opposed to "no persons shall desecrate flags, if they do so by means of arson, battery, or pollution." As for Alcohol, it seems that the optimal revision R<prime> is either a general extension of R to include all persons between eighteen and twenty-one, or a repeal; it is not a rule that provides, "persons between eighteen and twenty-one may not purchase alcohol, if they do so fraudulently." Similarly, the optimal revision R<prime> in Animal Sacrifice is likely either a general extension to prohibit the killing of any animals, or a repeal; it is not a rule that prohibits "the killing of pandas" or "cougars" or "eagles" (the specific animal killed in Animal Sacrifice), given the existence of a preexisting rule prohibiting the killing of endangered species. If repeal

is morally better than general extension, in Alcohol and Animal Sacrifice - and that is, at least, a real possibility - then X's action in these cases will not be covered by the optimal revision R<prime>, and he will have the legal right to have his sanction overturned.

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n430. See Frisby v. Schultz, 487 U.S. 474 (1988) (upholding law banning residential picketing).

n431. See Osborne v. Ohio, 495 U.S. 103, 112-14 (1990) (upholding rule designed to combat child pornography); New York v. Ferber, 458 U.S. 747, 764-74 (1982) (same).

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Let me put the point this way. X's action A is harmful or wrongful in our stylized cases; that is their very essence. But given the epistemic limitations of actors and state officials, it is likely or at least plausible that the optimal revision R<prime> does not include A. This is likely the case in Flag Desecration and Abortion, and may well be the case in Animal Sacrifice and Alcohol (if, in fact, the actions of animal-killing and alcohol-purchase-by-a-person- between-eighteen-and-twenty-one are, without more, not harmful or wrongful). An action of battering flag-desecration is wrongful, but only because it is battery, not because it is flag-desecration. And enacting a rule that prohibits "flag-desecration by battery" would be silly. The existence of this rule would increase legal complexity, without apparent countervailing benefit. Given the epistemic limitations of state officials and actors, legal complexity without countervailing benefit is not morally indifferent, but morally negative. (Speakers might be deterred from desecrating flags, if they knew that the flag-desecration laws remained on the books with various complex provisos. n432) Similarly for the remaining rules: [*132] provisions that cover "abortions of non-viable fetuses, by means of coercive threats," "the fraudulent purchase of alcohol by persons between eighteen and twenty-one" or "the killing of pandas" would not figure in the various R<prime>, because these hypothetical provisions are not needed to cover any harmful or wrongful actions that otherwise would escape legal rules. If legal terms were costless to apply, and if officials applied them perfectly, and if actors anticipated that state officials would apply provisions perfectly, then the hypothetical provisions would not matter, morally. But given the epistemic limitations of actors and state officials, moral reason obtains not to include the provisions in R<prime>. Therefore, for at least some of the stylized cases, X will plausibly have the legal right to overturn his sanction, even though his action is wrongful or harmful, and even if a court's legal role is to enact what it takes to be the morally optimal revision R<prime> of the invalid rule R.

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n432. Cf. Note, The First Amendment Overbreadth Doctrine, supra note 83, at 883-84 (arguing that "rule of privilege" applied to revise overbroad statute must be sufficiently clear to enable an actor to predict whether her conduct falls within revised rule).

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B. Institutional Objections

I have completed the moral defense of the Derivative Account. Moral reason can obtain to change, in some measure, the predicate of rules - specifically, of rules that fail the Liberty Schema or the Discrimination Schema. This explains why the rules in our stylized cases are unconstitutional. And, on plausible remedial views (such as a retroactive facial-invalidation view or even a retroactive- optimal-revision view), X can have a legal right to secure the invalidation of a rule, including his own sanction or duty, even if X's very action is properly sanctioned or coerced under a different description. This explains why, on the facts of our stylized cases, the actors' constitutional rights are violated.

What is there left for the defender of the Direct Account to say? She might raise certain institutional objections to the Derivative Account. n433 She might concede the moral plausibility of the account, but argue that courts are the wrong institutions for invalidating rules. Thus we must return to the Direct Account, however morally implausible it might be. In the remainder of this section, I will consider and rebut two institutional objections to the Derivative Account: (1) that the concept of "adjudication" embodied in Article III of the Constitution requires constitutional rights to be morally [*133] direct, not morally derivative; and (2) that even if this is untrue, the remedies employed by reviewing courts in constitutional cases are too weak for the Derivative Account.

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n433. On the importance of institutional considerations in shaping and limiting the practice of judicial review, see Adler, supra note 4, at 771-80; Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213-20 (1978); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190-95 (1988).

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1. Article III and the Concept of Adjudication

Imagine that Congress enacts the following act, styled the "Invalidation Act."

The Invalidation Act

Any person whose conduct is regulated by a state or federal statute (currently in force) that is subject to a colorable challenge under the First Amendment, the Equal Protection Clause, or the Due Process Clause may, if subject to a clear threat of prosecution under the statute, bring suit in federal district court against the officials responsible for enforcing the statute. If the plaintiff adequately represents the class of persons subject to the challenged statute, the court shall certify the suit as a class action; shall hear the suit; and, if the court concludes that the challenged statute is morally invalid under the First Amendment, etc., shall enter appropriate declaratory and injunctive relief in favor of the class of persons subject to the statute.

The position I am advancing in this article is that constitutional rights, in general, are neither more nor less morally robust than the legal rights

conferred by this hypothetical Invalidation Act. The Invalidation-Act plaintiff has the legal right to secure the judicial invalidation of a (state or federal) statute that goes morally awry - independent of the full details of her own conduct and the strength of her personal moral claim. My position is that constitutional rights are, in general, legal rights with precisely this moral content.

As an initial matter one might object that constitutional "rights," thus conceptualized, are not really rights at all. The objection might be framed thus: Rights are, by definition, trumps; a right, by definition, identifies some aspect of the rights-holder's own moral position - for example, an important interest of hers, or a valid claim she possesses under corrective or distributive justice - that outweighs the general good. n434 But surely the Derivative [*134] Account should not be defeated at the definitional stage, through a narrow and demanding definition of "rights." As I explained earlier, in Part I, my concept of a constitutional right is deliberately catholic; it is designed to leave open, for substantive debate, the merits of the Direct and Derivative Accounts. A constitutional right, understood in this catholic sense, is simply a legal power to secure the invalidation, in some measure, of a rule - of the rights- holder's own treatment under the rule, on the Direct Account, and of the rule overall, on the Derivative Account. It is a legal "right" in the broad sense of constituting a legal advantage: a Hohfeldian position that is advantageous to the holder. n435

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n434. Cf. Dworkin, Taking Rights Seriously, supra note 1, at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for ... imposing some loss or injury upon them."). In fact, I do not believe that Dworkin's subtle conceptualization of rights-as-trumps supports the Direct Account. A rights-as-trumps thesis does so only if legal rights must incorporate moral trumps. But to require this conflates the legal and the moral. See Wellman, supra note 45, at 3-11 (distinguishing between legal and moral rights); Dworkin, Taking Rights Seriously, supra note 1, at 90-94 (distinguishing between institutional and background rights); id. at 94-95 (noting that an institutional right to free speech is possible within a background theory of utilitarianism).

In any event, my claim here does not rest upon the best exegesis of Dworkin's rights-as- trumps thesis, or the best understanding of "rights." If legal "rights" must indeed incorporate moral trumps, then the Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause ground legal powers, and other legal advantages for claimants, but not "rights."

n435. See supra note 45; supra text accompanying notes 90-91.

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If the defender of the Direct Account insists that legal advantages are not truly rights unless they fit a more narrow and demanding definition, then my response is that "constitutional rights" are not necessarily rights within the meaning of a more narrow and demanding definition. Nothing in the so-called "Bill of Rights" n436 - a name the Constitution itself does not use - demands that the legal mechanism by which to secure the values of free speech, free

exercise, equal protection, and due process must be a mechanism that provides narrowly-defined rights to narrowly-defined rights- holders. Indeed, the relevant provisions of the "Bill of Rights" are framed, not as "rights," but as moral constraints upon government decisionmaking. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." n437 The Fifth Amendment provides that "No person shall ... [*135] be deprived of life, liberty, or property, without due process of law." n438 The Fourteenth Amendment provides that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." n439 The Derivative Account is perfectly consistent with these provisions, standing alone - that is, taken apart from Article III of the Constitution.

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n436. Dworkin himself has taken some care on this textual point. See Dworkin, Freedom's Law, supra note 1, at 7 ("The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights - the first several amendments to the document - and the further amendments added after the Civil War."). But cf. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

n437. U.S. Const. amend. I. The First Amendment goes on, of course, to refer to the "right of the people peaceably to assemble," U.S. Const. amend. I, but this cuts against the Direct Account. If the advocate of the Direct Account wants to argue that (1) rights are morally robust, and (2) the text of the Constitution creates morally robust rights, then the First Amendment's reference to the "right" of assembly, but not the "right" of free speech or free exercise, hardly supports claim (2) with respect to free speech or free exercise. The best that its advocate can say is that the First Amendment was loosely drafted.

n438. U.S. Const. amend. V.

n439. U.S. Const. amend. XIV.

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The better objection to the Derivative Account is one that relies, not upon the concept of constitutional rights, but rather upon the concept of adjudication embodied in Article III. What the Derivative Account claims is not merely that (1) rules can go morally awry; and not merely that (2) persons can possess legal powers (which are "rights" in my catholic sense) to secure the invalidation of rules that go morally awry; but further that (3) the rights-holder is entitled to secure the invalidation of a morally invalid rule by a federal court. How is this last part of the Derivative Account consistent with the institutional limits on federal courts that are set forth by Article III of the Constitution? Article III constrains federal courts to be adjudicatory bodies; it vests them with the "judicial Power of the United States," n440 and authorizes them only to hear "Cases" or "Controversies." n441 How is it consistent with Article III, and the concept of adjudication therein embodied, to conceptualize the practice of judicial review by federal courts as the invalidation of rules?

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n440. U.S. Const. art. III, 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

n441. See U.S. Const. art. III, 2.

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This question brings us back to my hypothetical Invalidation Act. The Invalidation Act creates a mechanism by which federal courts effectively invalidate rules: the anticipatory class-action that culminates in a declaratory judgment and injunction. A declaratory judgment and injunction against an invalid rule, when entered in favor of the entire class of persons subject to the rule, will operate roughly like a repeal of the rule: this remedy will rescind the legal authority of enforcement officials to prosecute anyone for violating the rule, and will preclude future courts, under the principle of res [*136] judicata, from sanctioning actors pursuant to the rule. n442 Further, the Invalidation-Act mechanism appears to comport with the various Article III constraints upon federal courts. The plaintiff's suit will be constitutionally ripe, because the duty of compliance with the challenged rule, backed by a clear threat of prosecution for its breach, constitutes an immediate setback for her. n443 The plaintiff will have standing, because she can "allege personal injury fairly traceable to the defendant's unlawful conduct" - the setback to her own interests constituted by the sanction-backed duty that the rule imposes upon her - such that this setback is "likely to be redressed by the requested relief." n444 The suit will not be moot or advisory, because the challenged rule is currently in force. n445 Finally, the plaintiff class-action has become a standard n446 and consti [*137] tutionally unremarkable n447 device by which federal courts properly consolidate the adjudication of legal rights. n448

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n442. See Fallon, supra note 83, at 880-81, 902-03 (discussing legal force of classwide relief in constitutional challenges to state statutes); David Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw. U. L. Rev. 759, 777-79 (1979) (same). My claim here about the legal force of classwide relief should be qualified by a point I alluded to above, see supra text accompanying notes 416-17: the classwide declaratory judgment and injunction may explicitly, and arguably should implicitly, leave open the possibility of a salvaging narrowing construction of the rule by its authoritative interpreter.

n443. See Lujan v. National Wildlife Fedn., 497 U.S. 871, 891 (1990) ("The major exception [to ripeness constraints on preenforcement review] is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once ...." (citing Abbott Labs. v. Gardner, 387 U.S. 136 (1967))). The Abbott Laboratories ripeness test also looks to the temporal fitness of the legal issues raised by the claimant, see 387 U.S. at 149, but this latter component of ripeness is arguably prudential not constitutional, see Chemerinsky, supra note 290, 2.4.1, at 116, and in any event the question whether the challenged rule satisfies a constitutional rule-validity schema is temporally "fit." I have added the proviso that there be a "clear threat" of prosecution, so as to assure the ripeness of the preenforcement Invalidation-Act suit even under a ripeness

doctrine more stringent than current doctrine. See infra text accompanying notes 587-98 (further discussing ripeness).

n444. See Allen v. Wright, 468 U.S. 737, 751 (1984) ("The requirement of standing ... has a core component derived directly from [Article III of] the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). On the existence of standing for the Invalidation-Act plaintiff, which hypothetical statute I will argue below just embodies the overbreadth doctrine, see Note, The First Amendment Overbreadth Doctrine, supra note 83, at 847-48 ("An overbreadth claimant must ask that normal rules of standing be relaxed, only if 'standing' is taken to include canons about the kinds of constitutional claims a party may raise, as well as such basic requisites of a justiciable controversy as actual grievance and a lively dispute. The former conception of standing is not a deduction from article III." (footnote omitted)); Fallon, supra note 83, at 868-69 (same).

n445. See generally Chemerinsky, supra note 290, 2.2, 2.5 (discussing Article III prohibitions on a federal court's issuance of an advisory opinion, or its adjudication of a moot dispute).

n446. See Shapiro, supra note 442, at 777 (noting, but criticizing, frequent use of class- action device in constitutional challenges to state statutes).

n447. See, e.g., Califano v. Yamasaki, 442 U.S. 682, 697-706 (1979) (upholding certification of nationwide class and entry of injunctive relief in suit, predicated on Due Process Clause, against federal agency).

n448. See generally Douglas Laycock, Federal Interference with State Prosecutions: The Need for Prospective Relief, 1977 Sup. Ct. Rev. 193 (describing and defending federal prospective relief - including class relief - against state criminal statutes).

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Nonetheless, it might be objected, the Invalidation Act violates Article III. The violation is subtle, but important - or so the defender of the Direct Account might argue. The argument would run as follows: "The legal rights that federal courts adjudicate must, by virtue of Article III, have a minimally robust moral content. Where a plaintiff P<1> brings a meritorious nonclass suit in federal court against some defendant D, claiming a violation of a legal right, and seeking a remedy that benefits only her, the following holds true: there exists a moral reason sufficient to provide P<1> that remedy, independent of the remedies provided to other plaintiffs P<2>, P<3> ... P<n> against D or against other defendants. The ancient, common-law rights that courts classically adjudicate - the common-law right of an injured person to collect damages from a tortfeasor; the common-law right of a disappointed promisee to collect damages from the breaching promisor - do indeed have this kind of robust moral content. These common-law rights are the exemplars for the types of legal rights that federal courts may permissibly adjudicate. Now, if there exists a class of plaintiffs P<1>, P<2>, P<3> ... P<n> such that each P<i> standing alone can advance a robust legal right against the same defendant D, and there are common issues of law or fact, the federal courts can consolidate the plaintiffs' suits through the class-action device. But it would subvert the very concept of adjudication, and the constraints set forth in Article III, to aggregate the

moral claims of the class of persons purportedly represented by the Invalidation-Act plaintiff, and effectuate a remedy that is morally justified in the aggregate - repealing a morally invalid rule - even though the plaintiff herself may have no moral claim to a personal remedy." Or so the argument might go. n449

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n449. See Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 309-12 (1988) (noting possible Article III objections to the adjudication of a class action, where individual class members do not, standing alone, have justiciable cases).

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It is plausible to think that the classic, common-law rights of the injured tort victim, or the disappointed promisee, do indeed have a fairly robust moral content. Consider, for example, the corrective- justice theory of tort law that Jules Coleman has recently defended [*138] in his book Risks and Wrongs. n450 Coleman argues, plausibly, that the plaintiff's legal claim in a classic torts case has the following moral content: the plaintiff P claims that the defendant D is a moral wrongdoer who has the distinct moral responsibility, by virtue of corrective justice, to repair the losses to P that her wrongdoing has occasioned.

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n450. Coleman, supra note 189.

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In the typical action tort suits bring victim-plaintiffs together with injurer-defendants, and only within this structure do questions regarding who should bear a particular accident's costs arise. That is, the goals of tort law are pursued only within a structure of case-by-case adjudication between individual victims and their respective injurers. It is not as if victims are free to bring suit against anybody. Normally, the victim is not free to argue that he should be compensated for his loss by someone simply because that person is a good risk spreader or reducer.... Instead, the injurer is held liable simply because she is responsible for the loss. She is the one who has the duty in corrective justice to make good the loss. n451

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n451. Id. at 374.

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We might construct a parallel corrective-justice account for the contract-law rights or property-law rights that courts classically adjudicate. n452 But it

would be mistake, I suggest, for constitutional scholars to extrapolate from the private-law analogy and insist that court-enforced constitutional rights must be equally robust. The concept of adjudication, insofar as it figures in Article III, does not require the legal rights that federal courts adjudicate to possess the kind of moral content that private-law rights typically, or sometimes, possess.

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n452. Cf. Moore, supra note 171, at 182 (grouping together deontological theories of the institutions of punishment, tort compensation, property, and contract as alternatives to utilitarian accounts of these institutions).

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In defending the Derivative Account from the Article III objection, I will rely upon the view of Article III famously developed by Owen Fiss, most trenchantly in his 1978 article The Forms of Justice. n453 Fiss's aim in The Forms of Justice was to vindicate what he called the "structural reform" n454 suit: the kind of suit, exemplified by desegregation suits against school systems and by prison-reform litigation, "in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by [*139] which these reconstructive directives are transmitted." n455 Specifically, Fiss wanted to vindicate the procedural devices characteristic to the structural-reform suit - the class-action form, and the entry of a permanent injunctive decree against the defendant bureaucracy (by which to create an ongoing supervisory role for the federal judge). n456

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n453. Fiss, supra note 20. A contemporaneous article that, like Fiss's, famously rejects a dispute-resolution view of federal adjudication, is Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

n454. Fiss, supra note 20, at 2.

n455. Id.

n456. See id. at 18-22, 27-28, 44-58.

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Fiss's analysis of the class action helps the Derivative Account tremendously. As Fiss put it: "The victim of a structural suit is not an individual, but a group." n457

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n457. Id. at 19.

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Once we take the group perspective on the victim, it ... becomes clear that the spokesman need not - indeed, cannot - be the victim. A group needs people to speak on its behalf. An individual member of the victim group can be a spokesman, but there is no reason why individual membership should be required, or for that matter even preferred....

... [Thus] certain technical qualifications for the victim - that he be subject to a risk of future harm, or that he be subject to irreparable injury - need not be satisfied by the spokesman. For the structural suit it is sufficient if these requirements are satisfied by the victim group. What the court must ask of the spokesman is whether he is an adequate representative n458

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n458. Id. at 19-20 (footnotes omitted).

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The Fissian view - of the structural-reform plaintiff as a representative for a class of persons to whom the state has done moral injury - is just the kind of view set forth by the Derivative Account. n459 But how can we square this representative conception of the structural-reform plaintiff with the concept of adjudication and the requirements of Article III? Fiss's answer was to reconceptualize adjudication itself - to deny that a more traditional conception, what Fiss called the "dispute-resolution" view of adjudication, was the right one.

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n459. With the exception, of course, that the Derivative Account need not include a Fissian conceptualization of the class as a "group" in the strong sense of Fiss's work on equal protection. See Fiss, supra note 20, at 147-70 (defining groups as "natural" entities distinct from their members, and defending "group-disadvantaging principle"). For example, the class of persons protected by the plaintiff who challenges a rule that violates the Liberty Schema is simply those persons within the scope of the rule who are coerced not to perform actions that, constitutionally, they should be free to perform. See supra text accompanying notes 315-33 (discussing Liberty Schema). They need not, and likely do not, have a "group" identity in Fiss's strong sense. And indeed, while Fiss adverts to this strong conceptualization of groups in The Forms of Justice, he also weakens it somewhat. See Fiss, supra note 20, at 19 (noting that group benefitted by structural-reform suit may have an identity apart from the suit-targeted institution, or may be defined in terms of the institution, e.g., as "welfare recipients").

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[*140]

There is nothing in the text of article III - in the rather incidental use of the words "cases" or "controversies" - that constitutionally constricts the

federal courts to dispute resolution. The late eighteenth century was the heyday for the common law, and ... the function of courts under the common law was paradigmatically not dispute resolution, but to give meaning to public values through the enforcement and creation of public norms, such as those embodied in the criminal law and the rules regarding property, contracts, and torts.... The judicial function implied by contemporary constitutional litigation, of which structural reform is part, is continuous with and maybe even identical to that of the common law. n460

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n460. Fiss, supra note 20, at 36-37 (emphasis added) (footnote omitted).

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In short, for Fiss, "the function of a judge is to give concrete meaning and application to our constitutional values." n461

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n461. Id. at 9.

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Think of this as a custodial, rather than a structural view of adjudication. n462 On the Fissian view, the legal body we call a "court" is defined by the particular moral criteria that are entrusted to this body for protection and care - what Fiss calls "constitutional values" or "public values" n463 - and not by the particular moral relations that may obtain between plaintiffs and defendants, or by the fact that judicial activity may be occasioned by concrete disputes.

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n462. See id. at 36 (distinguishing between "form" and "function" of adjudication, and giving conceptual priority to latter).

n463. See generally id. at 5-17 (defending "public values" or "constitutional values" view of adjudication).

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Now, I should emphasize that the exponent of the Derivative Account need not adopt a wholly Fissian view of adjudication and the requirements of Article III. Fiss's claim is particularly strong. He claims that "adjudication" is nothing but a custodial concept, and that Article III constrains federal courts only to eschew those procedures and devices that undermine their care for and protection of "constitutional values." n464 This may or may not be true, but, in any event, all that the Derivative Account requires is a weaker claim: The concept of adjudication, standing alone, does not take lexical priority, over the custodial role of federal courts, in the interpretation of Article III. Imagine that the concept of adjudication, standing alone, does entail a robust moral relation between plaintiff and defendant of the kind Coleman describes. Even so,

Article III cannot be read on its own, any more than other constitutional pro [*141] visions. n465 Federal courts have the dominant or at least a co-equal role n466 in safeguarding, from governmental infringement, the parts of morality set forth with sufficient specificity in the Bill of Rights. n467 Article III should not be interpreted to compromise this role in a serious way. But I have demonstrated that the Direct Account does indeed seriously dilute and compromise the moral criteria set forth in the Bill of Rights. Therefore, the Derivative Account does not violate Article III, all things considered.

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n464. See id. at 13 (defending certain formal features of adjudication, e.g., existence of judicial opinion, and absence of judge's control over her agenda, as integral to judicial function).

n465. See generally Charles L. Black, Structure and Relationship in Constitutional Law (1965) (arguing that the Constitution should be read holistically, not as sequence of discrete provisions).

n466. The advocate of judicial supremacy will say that courts have the dominant role. The advocate of departmentalism will say that other institutions, such as Congress, or the President, have a coequal role. See infra text accompanying notes 503-05 (discussing departmentalism). The Derivative Account is consistent with both. See id. But to accord courts the truncated role accorded by the Direct Account - safeguarding the epistemic rights of particular claimants - while Congress and the President repeal or amend rules that do nonepistemic wrong, is to make courts neither dominant nor coequal.

n467. Let me emphasize again that the originalism-nonoriginalism debate, and other such debates about the requisite specificity, etc., of constitutionalized moral criteria, see Adler, supra note 4, at 780-85, are independent of the debate between direct and derivative views of constitutional rights. The advocate of the Derivative Account can, if she wishes, demand a highly specific textual warrant for the criteria that courts enforce against rules, and require them to enforce the Framers' rather than their own conceptions of those criteria.

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I have formulated the argument this way so as to avoid a lengthy detour into the theory of adjudication. Fiss might be right: the concept of adjudication must just be custodial. Or, Fiss might be wrong, but the proper non-custodial concept might not entail a robust moral relation between plaintiff and defendant. (For example, in his well-known article The Forms and Limits of Adjudication, n468 Lon Fuller focuses upon participation as the essential ingredient of adjudication - "adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments" n469 - and not upon the moral robustness of the participants' legal claims.) The exponent of the Derivative Account can, if she wishes, develop a matching theory of adjudication. I will not try to do that, for my point is that - given the moral flaws in the Direct Account - Article III and the Bill of Rights should not, jointly, be read to require it.

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n468. Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978).

n469. Id. at 369.

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Note that a negative response to the Article III objection is well-supported by existing doctrines. If the Article III objection holds true, then my hypothetical Invalidation Act is unconstitutional. But of course the Invalidation Act is not unconstitutional! [*142] This hypothetical act is simply the First Amendment overbreadth doctrine in a thin disguise. The legal rights held by Invalidation Act plaintiffs have precisely the moral content of the legal rights that federal courts actually do enforce, under the rubric of the overbreadth doctrine. The official exegesis of that doctrine runs as follows:

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.... Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

....

The consequence [of the overbreadth doctrine] is that any enforcement of a statute [declared overbroad] is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. n470

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n470. Broadrick v. Oklahoma, 413 U.S. 601, 611-13 (1973) (emphasis added) (citations omitted).

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Thus the Court in Broadrick v. Oklahoma, the font of current overbreadth doctrine. n471 To be sure, that doctrine is seen as an "exception" to the normal type of constitutional right - the overbreadth litigant is seen to rely, exceptionally, upon the moral claims of other persons covered by the statute she challenges, rather than upon her own moral claims - but my point here is that this purported exception must nonetheless be consistent with Article III. Exceptional or not, the overbreadth doctrine conceives the litigant as holding a legal power to secure the invalidation of the rule under which she falls,

despite the absence of moral reason to protect her.

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n471. For similar statements by the Court, which go both to the proposition that the overbreadth claimant is not asserting his own moral claims and to the related proposition that an overbreadth holding prevents the enforcement of the invalidated statute against anyone, see cases cited supra note 148. The classic scholarly statement of this view is Note, The First Amendment Overbreadth Doctrine, supra note 83, at 844-47, 852-58.

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Indeed, the idea of courts invalidating statutes goes back well before the First Amendment overbreadth doctrine, which entered the Court's jurisprudence after the New Deal. The idea was sufficiently entrenched, by 1935, to prompt the legal scholar Oliver Field to write an entire treatise on the topic, The Effect of an Unconstitutional Statute. Field began the treatise by observing that: " [*143] For over a hundred years, state and federal courts in the United States have been declaring statutes unconstitutional." n472 Field contrasted the view that a statute declared unconstitutional is "void ab initio" - "entirely abrogated, except for the formality of a repeal" n473 - with the view that courts merely invalidate the application of statutes to particular litigants. Strikingly, Field found the first view to be dominant. n474 As Field put it: "It is no exaggeration to say that this theory that an unconstitutional statute is void ab initio is the traditional doctrine of American courts as to the effect of an unconstitutional statute." n475 And he continued: "Under the void ab initio view ... the rule is properly applied that a statute, once declared unconstitutional, need not be pleaded and assailed in subsequent cases." n476

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n472. Oliver P. Field, The Effect of an Unconstitutional Statute 1 (1935).

n473. Id. at 10.

n474. See id. at 2-8.

n475. Id. at 2 (emphasis added).

n476. Id. at 4.

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To be sure, specifying the conditions under which courts exercise the sweeping power described by Field has, both before and since the New Deal, been a matter of some dispute. In particular, there has been a heated and long-running controversy about the conditions for federal judicial invalidation of state statutes. n477 The dispute goes back to the Court's 1908 decision in Ex parte Young, n478 which crafted an Eleventh Amendment fiction to permit federal courts to enjoin state officials from enforcing statutes. It continued, in the pre-New Deal period, with the enactment of three-judge- court acts (requiring injunctions to be entered by panels of judges, rather than a single federal judge) and then the passage of the Declaratory Judgment Act n479 (intended in part as a less coercive technique for judicial invalidation of state

statutes). n480 And it was carried forward, in the post-New Deal period, with the line of cases from Dombrowski v. Pfister n481 to Younger v. Harris n482 to, finally, [*144] Steffel v. Thompson, n483 and Wooley v. Maynard n484 (all of which concern the proper timing of federal injunctive and declaratory relief against the state). n485 But this dispute merely proves my point. Its fervor simply reflects the fact that a federal court's entry of a declaratory or injunctive order prohibiting the enforcement of a state statute, in a class-action suit or even (as we shall see in a moment) in an individual suit, will effectively repeal the targeted statute.

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n477. See Douglas Laycock, The Death of the Irreparable Injury Rule 134-36 (1991) (describing this long-running controversy).

n478. 209 U.S. 123 (1908).

n479. 28 U.S.C. 2201-02 (1994).

n480. See Perez v. Ledesma, 401 U.S. 82, 112-15 (1971) (Brennan, J., concurring in part and dissenting in part) (discussing history and purpose of three-judge-court acts and Declaratory Judgment Act).

n481. 380 U.S. 479 (1965).

n482. 401 U.S. 37 (1971).

n483. 415 U.S. 452 (1974).

n484. 430 U.S. 705 (1977).

n485. See Chemerinsky, supra note 290, ch. 13 (discussing Younger abstention, and availability of federal declaratory and injunctive relief absent pending state proceeding, as per Steffel and Wooley).

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The Court, in crafting the First Amendment overbreadth doctrine, combined the judicial power to invalidate statutes, with the notion that invalidation might be justified at the instance of a litigant whose own moral claims were attenuated. "An individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution ...." n486 The proper scope of this "exceptional" doctrine has, again, been a matter of considerable dispute: from the initial enthusiasm during the Warren Court, to the Burger Court's retrenchment in cases such as Broadrick v. Oklahoma n487 and Brockett v. Spokane Arcades n488 that require "substantial" rather than merely some overbreadth. n489 But the dispute about the scope of overbreadth - among the Justices and among constitutional scholars writing in this area n490 - has generally taken for granted the permissibility of some such doctrine, under Article III.

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n486. Brockett v. Spokane Arcades, 472 U.S. 491, 503 (1985).

n487. 413 U.S. 601 (1973).

n488. 472 U.S. 491 (1985).

n489. See Redish, supra note 83 (describing this history).

n490. See sources cited supra note 83.

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To put the point another way: the official view sees constitutional rights as morally robust, but it does not see this robust cast as entailed by Article III. The Direct Account is traditional, in maintaining the robust content of constitutional rights; but an Article III defense of the Direct Account would dramatically revise the official view, and rescind doctrines (such as overbreadth n491) that presume [*145] the permissibility of morally minimal litigants. For the reasons I have discussed - the reasons most trenchantly articulated by Fiss - the official view of Article III is right.

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n491. Other "prophylactic" constitutional doctrines, such as the exclusionary rule, may be similar to overbreadth, in conferring a legal right upon one person so as to protect the moral rights of others. See Fallon, supra note 83, at 869 n.96 (discussing ubiquity of prophylactic rules in constitutional law); Strauss, supra note 433 (same). Certainly the jus tertii doctrine is similar to overbreadth in this way. See infra text accompanying notes 558-72 (discussing jus tertii).

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2. The Strength of Judicial Remedies

The second institutional objection to the Derivative Account is that the remedies employed by reviewing courts, in constitutional cases, are too weak: the judicial decision simply reverses the treatment pursuant to a rule of a particular litigant, and does not generally rescind the legal authority of state officials to enforce the rule, or generally relieve actors of the duty to comply with it. This second objection is easily parried, now that I have rebutted the first and deeper objection: that judicial invalidation of rules at the instance of morally minimal litigants violates Article III and the concept of adjudication therein embodied. Given the failure of the first objection, the second objection becomes merely technical. For the various kinds of constitutional cases in the federal courts - class- action cases, Supreme Court cases that are not class-actions, and non-class cases in the lower federal courts - I simply need to explain how the remedies entered in these cases operate to repeal the rules against which those remedies are targeted. The question, now, is not whether courts can (consistent with Article III) invalidate rules, but merely how they do.

For the sake of simplicity, I will focus on the techniques by which federal courts invalidate state or federal statutes. My analysis readily extends to the invalidation of non-statutory rules (for example, regulations enacted by state

or federal agencies, or rules announced in administrative adjudications) but because the thrust of this article is theoretical, not technical, a discussion of the most salient type of rule-invalidation - the invalidation of statutes - should suffice. n492 Further, because the standard judicial remedy with respect to conduct-regulating rules (at least as evidenced by Supreme Court case law) is a facial or partial invalidation, not an extension, I will not belabor matters by discussing the issue of extension here.

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n492. See Adler, supra note 4, at 806-10 (emphasizing that judicial review is not solely or mainly comprised by the invalidation of statutes).

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Let us begin with the easiest case: a class-action suit in the federal courts that challenges a state or federal statute on constitu [*146] tional grounds and that terminates with declaratory and perhaps injunctive relief. The declaratory judgment - to the effect that the statute is either facially invalid, or partly invalid to the extent specified in the court's judgment n493 - will, under accepted principles of res judicata, protect the class members from being sanctioned pursuant to the (invalidated portion of the) statute, in any subsequent enforcement suits that state officials might try to bring. n494 If the Derivative Account is correct, then the following also holds true: this class-wide declaratory judgment should be taken by enforcement officials as rescinding their legal authority to enforce the statute (within its invalidated scope), and by actors (within that scope) as rescinding their duty to comply with the statute. The declaratory judgment may or may not be accompanied by a permanent injunction - the effect of which would be to back up the court's rescission of official authority, with the clear threat of criminal or civil sanctions for contempt of court if state enforcement officials ignore the rescission. n495 It remains open to debate, within the Derivative Account, whether injunctions should normally accompany declarations when courts invalidate statutes. (The Derivative Account will reject a conceptual attack on injunctions, to the effect that courts lack the power to rescind the powers of state officials, but there might be pragmatic grounds against routine injunctive relief. n496) Further, the class-wide declaratory judgment, with or without injunction, will not operate as a precise repeal of the targeted statute, in the following sense: As scholars such as Richard Fallon and David Shapiro have quite properly emphasized, this remedy should not necessarily be taken to prevent enforcement officials from securing (through means other than an enforcement suit) an authoritative and narrowing interpretation of the statute, from the bodies responsible for interpreting it, that renders the thus-narrowed statute constitutionally valid. n497 But the Derivative Account can read [*147] ily incorporate this point: n498 the truly optimal response to a statute that goes morally awry might be not its facial invalidation, nor the revision R<prime> that the reviewing court takes to be optimal, but the re- revision that the statute's authoritative interpreter subsequently chooses under the rubric of statutory interpretation.

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n493. See Shapiro, supra note 442, at 767 (noting this possibility).

n494. See id. at 762-70 (generally discussing res judicata effect, for parties to a non-class federal declaratory suit, of a declaratory judgment holding a state statute to be partly or wholly unconstitutional); id. at 777-79 (extending discussion to class actions).

n495. See Steffel v. Thompson, 415 U.S. 452, 471 (1974) (noting that " 'noncompliance [with a declaratory judgment] <elip> is not contempt' " (quoting Perez v. Ledesma, 401 U.S. 82, 126 (1971) (Brennan, J., concurring in part and dissenting in part))).

n496. See 415 U.S. at 460-72 (describing differences between declaratory judgments and injunctions, in particular less coercive cast of former).

n497. See Fallon, supra note 83, at 854-55, 898-903; Shapiro, supra note 442, at 768-70. Shapiro and Fallon agree - consistent with the Derivative Account - that the curative effect of this narrowing interpretation should only be prospective.

n498. As it can the proposition that a federal court should perhaps abstain, pending construction of the statute by its authoritative interpreter, or certify the interpretive question to that body. See generally Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1072-74 (1997) (discussing techniques of certification and "Pullman" abstention to obtain authoritative constructions of state statutes challenged in federal courts on constitutional grounds).

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What about a non-class case that reaches the Supreme Court - perhaps an appeal from a state or federal enforcement action, or perhaps an appeal from a individual's declaratory or injunctive suit in state or federal court? Here, too, the Derivative Account is straightforward. A holding by the Supreme Court that a state or federal statute is facially or partly invalid operates to rescind the legal authority of enforcement officials and lower courts to apply the statute (within the invalidated portion) to anyone, at least pending an authoritative narrowing construction of the statute. Professor Fallon, in his thorough recent study on overbreadth, explains: "Supreme Court holdings of overbreadth ... should confer immunity on all conduct occurring after the judgment is entered and before a constitutionally adequate narrowing construction is obtained." n499 The doctrinal basis for Fallon's rightful confidence in the authority of the Supreme Court to invalidate state or federal statutes is the Court's famous announcement in Cooper v. Aaron. n500 The Court in Cooper, in the face of a defiant refusal by the Arkansas authorities to desegregate the Arkansas schools, announced that the holding of Brown v. Board of Education was binding law for government officials everywhere, not just for the particular parties in Brown.

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n499. Fallon, supra note 83, at 908. Professor Shapiro, who shares Professor Fallon's skepticism about the scope of judicial remedies in non-class suits in the lower federal courts, agrees with Fallon about the broad scope of a Supreme Court holding. See Shapiro, supra note 442, at 777.

n500. 358 U.S. 1 (1958).

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The federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ... been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." n501

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n501. Cooper, 358 U.S. at 18.

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Cooper means that the Court's constitutional utterance has far greater scope than, as a matter of res judicata alone, it should: the utterance binds the world.

In recent years, the Cooper doctrine has ignited a fair amount of scholarly controversy. One, radical objection is that courts simply cannot bind non-parties. n502 This objection trades upon a conceptual point about "adjudication" and Article III, of the kind that, I have already argued, we should reject. The second, less radical objection points to the co-equal and "dialogic" role of institutions other than the Supreme Court - for example Congress, or state legislatures - in interpreting the Constitution. n503 The Derivative Account can readily incorporate this less radical objection. It is consistent with the Account to stipulate that Congress can permissibly engage in constitutional dialogue with the Court by re-enacting the very same statute that the Court has previously invalidated; or even perhaps that the President can trigger a dialogue on his own, by directing the Department of Justice to enforce an invalidated statute. n504 What is inconsistent, and implausible, is the claim that governmental bodies beneath this top tier - specifically, enforcement agencies operating in the absence of a legislative, presidential or gubernatorial mandate to defy the Supreme Court, and lower state or federal courts - are also free to ignore the Court's utterances, when the Court declares statutes to be constitutionally invalid. n505

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n502. For opposition to Cooper that trades upon a general opposition to the idea of judicial decisions binding non-parties (as against a specific opposition to decisions binding certain institutions, e.g., legislatures), see Edwin Meese, The Law of the Constitution, 61 Tul. L. Rev. 979 (1987); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43 (1993). See also Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 272-76, 274-84 (1994) (arguing that judicial decisions do not bind executive branch with respect to nonparties, but also asserting that judicial judgments are not binding against executive).

n503. See Robert Burt, The Constitution in Conflict (1992). For an overview of departmentalism, including this less radical, "dialogic" view, see Walter F. Murphy, Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter, 48 Rev. Pol. 401 (1986).

n504. Note, however, that a departmentalist who espouses some degree of Presidential autonomy in interpreting the Constitution need not go so far. See Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 906-11, 913-16 (1989-90) (distinguishing between less and more controversial types of presidential nonacquiescence).

n505. I should note that Professors Estreicher and Revesz - the leading proponents of federal agency nonacquiescence - are specifically concerned with agency nonacquiescence in statutory decisions by federal courts, and have been unwilling to extend their arguments to support agency nonacquiescence on constitutional matters. See Samuel Estreicher & Richard Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 720 & n.214 (1989).

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We come, finally, to the toughest case for the Derivative Account: a non-class case in the lower federal courts, whether an en [*149] forcement action, or a declaratory and injunctive action by the claimant in federal district court, or an administrative review proceeding commenced in the federal court of appeals, or a habeas suit in district court. The difficulty here is that: (1) as a matter of res judicata, the lower federal court's purported invalidation of the statute (even in the shape of an injunction prohibiting its enforcement) binds state officials only with respect to the claimant, not with respect to the other actors covered by the statute; n506 and (2) Cooper v. Aaron does not apply. n507 As Professor Fallon notes, in the case of a purported lower-court invalidation of a state statute for overbreadth:

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n506. This is true, at least, if the res judicata effect of the federal judgment is itself a matter of federal law, see Shapiro, supra note 442, at 763 (arguing that it is), and if the Supreme Court's decision in the Mendoza case, see United States v. Mendoza, 464 U.S. 154 (1984) (nonmutual collateral estoppel generally unavailable against federal government), protects state governments as well, see Note, Nonmutual Issue Preclusion against States, 109 Harv. L. Rev. 792 (1996) (discussing applicability of Mendoza to state governments).

n507. See, e.g., Dorf, supra note 38, at 283 n.219 (stating that "on questions of federal law, the state courts are bound only by the United States Supreme Court, and not by the lower federal courts," and citing sources).

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Because state courts and lower federal courts stand in a coordinate, rather than a hierarchical, relationship, the binding effect of the federal judgment extends no further than the parties to the lawsuit. Against nonparties, the state remains free to lodge criminal prosecutions. Civil actions can also go forward. n508

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n508. Fallon, supra note 83, at 853-54 (footnotes omitted); accord, Shapiro, supra note 442, at 770-76. The Supreme Court has said the same quite explicitly, see Doran v. Salem Inn, 422 U.S. 922, 931 (1975) (noting that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute").

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Fallon concludes that "the familiar vocabulary of 'voidness,' 'invalidation,' and 'striking down' thus does more to mislead than describe." n509

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n509. Fallon, supra note 83, at 854.

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But Fallon's skeptical conclusion must, somehow, be wrong. The basic premise of the First Amendment overbreadth doctrine is that a federal court, by invalidating a statute, protects nonparty speakers within the statute's scope. If lower federal courts cannot, in fact, invalidate statutes (outside of class actions), then an overbreadth challenge should be unavailable in lower federal court (outside of a class action). That is not the official doctrine, at all. n510 The way to avoid Fallon's skeptical conclusion, and more generally to explain lower court utterances within the Derivative Account, is by conceptualizing these utterances as partial steps in a multi-step, temporally extended process of judicial repeal. We might say, for [*150] example, that a federal district court utterance purporting to invalidate a state statute is not generally binding on state officials, except in the case of a class action, until the holding is concurred in by the state supreme court or (some or all) of the state courts of appeals. Or, for a federal statute, we might say that federal prosecutors, absent a class action, are bound (beyond the scope of res judicata) only to refrain from enforcing statutes that have been held unconstitutional in all, or a majority of, the federal circuits. The basic idea is that, for a particular rule R, there are multiple lower courts (by which I mean, here, courts other than the federal Supreme Court) with jurisdiction to adjudicate a federal constitutional challenge to R: lower federal versus state courts, or lower federal courts with different geographic jurisdictions. For epistemic reasons, it may well make sense to require something approaching unanimous agreement among the relevant lower courts, before enforcement officials should count themselves under a legal obligation not to enforce the invalidated statute; and to use the federal Supreme Court as the institution for resolving disagreements among the lower courts. Legal scholars outside of constitutional law, addressing the issue of federal agency nonacquiescence in the non-constitutional rulings of federal appellate panels, have advanced this kind of suggestion: the suggestion is that federal agencies are free to "nonacquiesce" in appellate rulings, but only given nonunanimity among the circuits. n511

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n510. See supra text accompanying note 470 (official statement of doctrine).

n511. I take this, essentially, to be the view of Professors Estreicher and Revesz. See Estreicher & Revesz, supra note 505, at 753 (arguing that "agencies should not engage in intracircuit nonacquiescence unless [inter alia] the agency is reasonably seeking the vindication of its position both in the courts of appeals and before the Supreme Court").

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The idea of intertemporal repeal - of a voting process among the relevant lower courts, those with jurisdiction over some rule R - fits comfortably with the Derivative Account. The proponent of that account can concede the epistemic benefits of requiring something approaching unanimity among the relevant lower courts prior to holding enforcement officials obligated (beyond the scope of res judicata) not to enforce a rule. This helps explains why the law of res judicata has not been changed: n512 why judicial rulings against the government are not, technically, res judicata beyond the particular prevailing litigant. What the proponent of the Derivative Account will not concede is that if, for example, both the state courts [*151] and the lower federal courts concur in deciding that a state statute should be invalidated, and there is no reasonable chance of federal Supreme Court review, state prosecutors should nonetheless consider themselves legally free to continue enforcing it. And Fallon presents no argument to the contrary. n513

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n512. It also explains perhaps why lower courts ought not automatically certify class actions in constitutional cases, even assuming representative plaintiffs. See Shapiro, supra note 442, at 779 (arguing for judicial caution in certifying classes if that would "unfairly deprive state courts of the opportunity to express their views"); Estreicher & Revesz, supra note 505, at 721 n.218 (making a similar suggestion for statutory challenges to federal agency action).

n513. See Fallon, supra note 83, at 880-82 (discussing limited scope of lower court relief in non-class cases).

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It is a further question whether, absent a Supreme Court ruling on point or a class-wide injunction, a state or federal official enforcing a statute that the relevant lower courts have declared invalid should be subject to sanction in the shape of criminal penalties under 18 U.S.C. 241 n514 and 242, n515 or monetary damages under 1983 n516 and Bivens. n517 Perhaps the line between an incomplete and a completed intertemporal repeal is too fuzzy to warrant sanctions against enforcement officials who may innocently stray across the line. (Innocent straying may need to be corrected by a subsequent class-action suit. n518) Nonetheless, enforcement officials have a constitutional, legal duty (sanction-backed or not) to observe the line. Legal duties can exist without sanctions; n519 for example, a sanctionless duty could be a legal duty because it is grounded, via the legally correct methods of derivation, in some legal

text. The Supreme Court, the legal body responsible for interpreting the Bill of Rights, has announced (at least in the context of overbreadth doctrine) that enforcement officials have a legal duty not to enforce statutes that the federal courts invalidate. To quote the Court: "The consequence of [a judicial declaration invalidating a statute as overbroad] is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." n520 And this an [*152] nouncement is indeed legally correct. The legally correct method of deriving legal rights and duties from the moral criteria set forth in the Bill of Rights is (some kind of) moral reasoning; the Derivative Account is the morally best account of those criteria; and the legal implication of the Derivative Account is that state and federal officials have a legal duty not to enforce statutes that the federal courts have invalidated, whether through a class action, a Supreme Court announcement, or what I have called an intertemporal lower-court repeal.

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n514. See 18 U.S.C. 241 (1994) (prohibiting conspiracy to deprive persons of constitutional rights).

n515. See 18 U.S.C. 242 (1994) (prohibiting deprivation of constitutional rights under color of law).

n516. See 42 U.S.C. 1983 (1994).

n517. See Bivens v. Six Unknown•Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). See generally Kent Greenawalt, Constitutional Decisions and the Supreme Law, 58 Colo. L. Rev. 145, 171 (1987) (noting these possibilities, with respect to nonacquiescence in Supreme Court decisions).

n518. See Estreicher & Revesz, supra note 505, at 758 (stating that class-action device is warranted in event of unjustified agency nonacquiescence).

n519. See Raz, supra note 54, at 154-62, 158 (discussing generally the conceptual possibility of sanctionless legal norms, and noting that, although mandatory norms addressed to ordinary individuals are always in practice sanction-backed, there exist "mandatory norms addressed to officials which are not backed by sanctions").

n520. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (emphasis added).

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Professor Fallon, who undertook an empirical survey of state prosecutorial responses to lower-federal-court holdings of overbreadth, found the following:

[The survey identified] 45 cases [in the relevant time period] in which lower federal courts held state statutes unconstitutionally overbroad, but only three cases - two involving the same statute - in which state prosecutors, following federal holdings of overbreadth, brought actions to enforce the affected

statutes.... This sample suggests ... that overbreadth holdings by lower federal courts may be far more potent in practice than the surrounding legal doctrines would require them to be. n521

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n521. Fallon, supra note 83, at 888 n.219.

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My conclusion would be a bit different. To my mind, the overwhelming incidence of prosecutorial compliance with lower-federal- court overbreadth holdings demonstrates that the remedial techniques available to the federal courts are, in practice, quite potent enough to support what legal doctrine should be, namely, the Derivative Account.

Conclusion

What is the moral focus of judicial review? Are constitutional- reviewing courts essentially concerned with the treatment of particular litigants? Or is their task essentially legislative? Are they focused, not on the morality of the particular sanction, duty, or other negative treatment that the litigant at hand has received, but rather on the moral reasons for and against the underlying rule? And is the litigant's case, then, merely an occasion for judicial amendment or repeal of rules that go morally awry? The aim of this article has been to address and answer, as rigorously as possible, these foundational questions about the nature of judicial review. I have tried, here, to get straight our basic picture of constitutional adjudication. The right picture, unfamiliar though it may be, is what I have called [*153] the Derivative Account. n522 Constitutional rights are morally derivative, not morally direct (at least insofar as rights are substantively infringed by sanctions or coercive duties, those most elementary sources of rights-violation). n523 And this revision to our basic picture of constitutional adjudication should, in turn, have wide doctrinal implications - for the wide variety of doctrines, both procedural and substantive, that a basic picture informs. The availability of facial challenges to rules; the contours, indeed very existence, of the overbreadth doctrine; the proper timing for the adjudication of constitutional claims; the proper parties to litigate such claims; the scope of judicial remedies; the content of substantive constitutional doctrines governing the predicate and history of rules under the Free Speech Clause, Free Exercise Clause, Equal Protection Clause, and the substantive component of the Due Process Clause - these matters, and others, will depend crucially upon whether the Direct Account or the Derivative Account of constitutional rights holds true.

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n522. See supra Part II (arguing against Direct Account); supra Part III (arguing in favor of Derivative Account).

n523. See supra text accompanying notes 56-57 (discussing and defending article's focus on sanctions and sanction-backed duties).

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Given the breadth and diversity of such matters, it is beyond the scope of this article to specify, in detail, the doctrinal changes that flow from the Derivative Account. A full discussion of the affected doctrines would require at least as much space and effort as the basic theorizing that this article has tried to complete. Rather, in this Conclusion, I will simply describe, in a brief and general way, the main areas of constitutional doctrine implicated by the morally derivative cast of constitutional rights. It is these areas, principally, that the Derivative Account will require us to rethink and to revise.

Let us begin with the problem of facial challenges. This is a problem that, in recent years, has excited great controversy at the Court, in areas of constitutional law ranging from commercial speech, to political speech, to equal protection, the Establishment Clause, the Takings Clause, and, finally, substantive due process (both abortion rights and, just recently, assisted suicide). n524 Indeed, the controversy over facial challenges now rivals, in intensity and breadth, the controversy over standing that became acute during the 1980s. n525 What triggered the now-familiar disputes over stand [*154] ing was the Court's adoption of a highly restrictive approach - an approach linked to the Direct Account - that threatened to close the courthouse doors to large classes of constitutional litigants. n526 Similarly, the current debates (equally ardent and wide-ranging) n527 about facial challenges have been triggered by the Court's announcement and repeated affirmation of a doctrinal test that threatens to eviscerate the practice of facial invalidation.

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n524. See supra note 39 (citing cases in these areas).

n525. The scholarly literature from this period that was animated by the resurgent importance of the standing requirement includes: Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1 (1984); William A. Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988); Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, 133 U. Pa. L. Rev. 635 (1985); Cass R. Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988); Steven L. Winter, The Metaphor of Standing, 40 Stan. L. Rev. 1371 (1988).

n526. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying standing); Allen v. Wright, 468 U.S. 737 (1984) (same); City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (same); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (same); Warth v. Seldin, 422 U.S. 490 (1975) (same). On the link between a restrictive approach to standing and the Direct Account, see infra text accompanying notes 584-85.

n527. To be sure, the ardent and wide-ranging debates about facial challenges have, hitherto, remained debates within the judiciary. There has not, yet, been a broad scholarly appreciation of the depth and import of this judicial debate. Although there is a well- developed scholarly literature on overbreadth, see sources cited supra note 83, this focuses on facial challenges in the First Amendment context, and largely predates the current judicial debates. The only general scholarly piece on facial challenges is Professor Dorf's Facial

Challenges to State and Federal Statutes. See Dorf, supra note 38. A number of student notes have been written recently on the problem of facial challenges in the abortion area. See Ruth Burdick, Note, The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test, 23 Hastings Const. L.Q. 825 (1996); John Christopher Ford, Note, The Casey Standard for Evaluating Facial Attacks on Abortion Statutes, 95 Mich. L. Rev. 1443 (1997); Skye Gabel, Note, Casey "Versus" Salerno: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes, 19 Cardozo L. Rev. 1825 (1998).

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This is the Salerno test. In United States v. Salerno, n528 the Court announced:

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n528. 481 U.S. 739 (1987).

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A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute reviewed in Salerno] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. n529

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n529. Salerno, 481 U.S. at 745.

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Salerno says, or appears to say, the following: Given some rule R, a court should facially invalidate R only if, for every person X against whom R might be enforced, the application of R to X would be unconstitutional. n530 And indeed this is the correct test if the Direct Account holds true. Salerno starts with the notion that constitu [*155] tional adjudication is, centrally, as-applied adjudication. n531 What concerns the reviewing court, first and foremost, is whether X's own treatment is unconstitutional. If it turns out that the application of rule R to X is not unconstitutional, then what claim - asks the Salerno Court - does X have to judicial relief? X's only claim would be an overbreadth claim: a claim that R should be facially invalidated because it is unconstitutional as applied to too many other litigants. But, officially, there is no overbreadth doctrine outside the First Amendment; n532 the Court has never said otherwise. So, outside the First Amendment, a rule should be sustained over a facial challenge if there is some set of circumstances under which an as-applied challenge to the rule fails. This is currently the official doctrine for facial challenges, and it follows inexorably from the morally direct cast

of constitutional rights that the Salerno Court, quite standardly, takes to obtain.

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n530. See Dorf, supra note 38, at 241 ("Under [Salerno's] 'no set of circumstances' test, the government need only produce an example in which the statute could be applied constitutionally to defeat the facial challenge.").

n531. See Ada v. Guam Socy. of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting from denial of certiorari) (defending Salerno by describing as-applied adjudication as central and standard type of judicial review).

n532. See Ada, 506 U.S. at 1012 (Scalia, J., dissenting from denial of certiorari); Salerno, 481 U.S. at 745. In its First Amendment overbreadth cases, the Court has consistently described overbreadth as a First Amendment exception to the normal practice of adjudication. See, e.g., Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990); New York v. Ferber, 458 U.S. 747, 767-69 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 611-15 (1973); see also Ford, supra note 527, at 1450-55 (discussing Court's use of an unarticulated overbreadth doctrine in its abortion cases).

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To see the import of Salerno, consider a sweeping law regulating abortion. I pick abortion as an example because the implications of Salerno, here, are particularly counterintuitive - at least for lawyers, scholars, and jurists who accept the justiciability of abortion rights n533 - and, relatedly, because the judicial disputes here about facial challenges have been particularly fiery. n534 Consider, for example, Guam's statute outlawing all abortions except in cases of medical emergency, which the Ninth Circuit held to be facially invalid. n535 The Supreme Court thereupon denied Guam's petition for [*156] certiorari, prompting a vigorous dissent by Justice Scalia, n536 who argued that Salerno precluded a facial invalidation of even this highly restrictive statute.

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n533. See Ford, supra note 527, at 1445-46 (noting that "if the Supreme Court were faithful to Salerno, it would reject every facial attack on statutes restricting access to abortions").

n534. See Janklow v. Planned Parenthood, 517 U.S. 1174, 1175 (1996) (denying certiorari) (memorandum of Stevens, J.); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (denying stay) (O'Connor, J., concurring); Ada, 506 U.S. at 1011 (denying certiorari) (Scalia, J., dissenting from denial of certiorari); Planned Parenthood v. Casey, 505 U.S. 833, 972-73 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Indeed, the problem of reconciling Salerno with the Court's willingness (most recently, in Casey) to sustain facial challenges to laws restricting abortion has generated a circuit split. See Burdick, supra note 527, at 872-75 (describing circuit split); Ford, supra note 527, at 1447- 48 (same); Gabel, supra note 527, at 1837-41 (same).

n535. See Guam Socy. of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366 (9th Cir.), cert. denied, 506 U.S. 1011 (1992).

n536. See Ada, 506 U.S. at 1011 (Scalia, J., dissenting from denial of certiorari).

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Under this Court's current abortion caselaw, including Casey, I see no reason why the Guam law would not be constitutional at least in its application to abortions conducted after the point at which the child may live outside the womb. If that is so, the Ninth Circuit should have dismissed the present, across-the-board challenge. n537

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n537. 506 U.S. at 1013 (Scalia, J., dissenting from denial of certiorari).

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The same might be said of a law prohibiting all previability abortions; we can imagine instances of previability abortion that would be wrongful under other descriptions (for example, a previability abortion secured through a coercive threat, as in Abortion). Salerno implies that most of the major cases, up to and including Casey, n538 in which the Court has sustained abortion-rights claims, were wrongly decided - for most of these cases involved facial invalidation of rules that, one would imagine, had some morally acceptable applications. n539

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n538. 505 U.S. at 887-99 (facially invalidating spousal-consent provision of statute regulating abortion).

n539. The cases I mean are: Casey, 505 U.S. 833 (1992); Hodgson v. Minnesota, 497 U.S. 417 (1990); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); Belloti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); and Roe v. Wade, 410 U.S. 113 (1973). All of these are, I suggest, best categorized as involving facial invalidations.

The only exception to the Court's reliance on facial invalidation, in sustaining abortion- rights claims, is its occasional narrowing of statutes under the rubric of statutory interpretation, see, e.g., Planned Parenthood Assn. v. Ashcroft, 462 U.S. at 490-93, which is properly seen as a kind of partial invalidation, see generally Adler, supra note 4, at 834-39.

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Not surprisingly, then, the applicability of Salerno to laws regulating abortion has been rejected by Justice O'Connor, who (along with Justices Souter and Kennedy) authored the joint opinion for the Court in Casey. As Justice O'Connor has explained:

In striking down Pennsylvania's spousal-notice provision [in Casey], we did not require petitioners to show that the provision would be invalid in all circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." n540

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n540. Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay and injunction) (second alteration in original) (quoting Casey, 505 U.S. at 895). Interestingly, Justice Souter joined Justice O'Connor's concurrence in Fargo, but Justice Kennedy did not. See 507 U.S. at 1013.

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[*157]

But the proponent of Salerno is entitled to ask: Why should Justice O'Connor's be the test? Why should a rule be facially invalidated if there is some context in which an as-applied challenge to the rule would fail? Neither the judicial nor the scholarly critics of Salerno have, in my view, given a satisfactory answer to that question. The answer, I suggest, is simply this: There is no such thing as a true as- applied constitutional challenge. n541 The very idea is a mistake. Until we get rid of that idea, our doctrines for adjudicating facial challenges will remain confused. The concept of unconstitutionality does not attach to the treatment of particular litigants; it attaches, on the Derivative Account, to the enactment of statutes and other rules. Salerno conceives of the facial invalidity of a rule as the limiting point of as-applied invalidity: a rule is facially invalid if, for every application of the rule, that application is constitutionally invalid. Justice O'Connor, in her response to Salerno, tries to soften the test somewhat: a rule is facially invalid if, for many applications of the rule, those are constitutionally invalid. n542 But both tests are mistaken, because both trade upon the mistaken, albeit standard, notion that rule-applications can be properly described as unconstitutional.

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n541. By this I mean just that constitutional litigation does not concern the morality of the application of a rule to a particular claimant; it does not concern whether the claimant's treatment should be overturned, independent of further invalidating the rule. "As-applied" adjudication in the (less robust) sense of adjudication that depends, in part, on facts about the claimant rather than depending exclusively on the predicate and history of the rule, is quite consistent with the Derivative Account, as I have already explained, see supra text accompanying notes 140-45, 414-21.

n542. One might object that Justice O'Connor's test means to ask, not whether a large fraction of an abortion-regulating rule's applications are unconstitutional, but rather whether a large fraction of the rule's applications (say, sanctions) are morally wrong. If so, the O'Connor test is consistent with the facial rather than as-applied cast of constitutional adjudication; but one can still debate whether the absolute or relative number of morally problematic applications should be a factor in constitutional rule-validity schema. A rule breaches the Liberty Schema or the Discrimination Schema if the rule, without sufficient reason, restricts liberties or includes a discriminatory predicate, see supra text accompanying notes 326, 384; there is no further question of the rule being largely, or only a little bit, wrong. But perhaps a further question of this kind is appropriate for courts to ask, e.g., if docket- congestion or the exigencies of judicial efficacy in constitutional cases, see Gerald N. Rosenberg, The Hollow Hope 336 (1991) (questioning efficacy of judicial remedies), require limiting judicial intervention to the most serious cases of morally problematic rules.

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Let me put the point this way. On the Derivative Account, every constitutional challenge involves the facial scrutiny of rules. In every constitutional case (at least where claimants substantively challenge sanctions or sanction-backed duties), the court's task is to assess the predicate and history of the underlying rule against one or more rule-validity schema. Substantive constitutional doctrines, such as the narrow-tailoring doctrines familiar from free speech [*158] law, n543 the "undue burden" doctrine announced in Casey for abortion rights, n544 or the antidiscrimination doctrines for free exercise and equal protection, n545 are all facial doctrines, in the following sense: these doctrines serve to determine whether morality requires some change in the canonical language of the scrutinized rule. Now, it remains an interesting remedial problem how the reviewing court should remedy a rule that fails the moral scrutiny subserved by these familiar rule-validity tests. This is the problem I adverted to in section III.A.3. One possible remedy is facial invalidation, another is partial invalidation or even extension, and there are pros and cons to each. Facial-challenge doctrine, properly understood, is a doctrine that addresses this remedial problem - and no more than that. It is a doctrine that answers the question: Where a rule is constitutionally invalid, should the reviewing court repeal the invalid rule, or should the court instead amend the rule in some way? The answer might be that courts should never repeal rules if there exists a narrower, curative amendment - which would have the effect of making facial invalidation quite rare. But if that is the correct answer, it is correct because of the moral losses that flow from facial invalidation, the skill of courts in crafting curative amendments, and so forth, and not because of the morally direct cast of constitutional rights. n546

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n543. See supra text accompanying notes 321-25.

n544. See Casey, 505 U.S. at 869-79.

n545. See supra text accompanying notes 98-113.

n546. See supra text accompanying notes 414-21 (discussing pros and cons of facial vs. partial invalidation of rules).

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The flip side of the Court's confusion about facial challenges is its confusion about the overbreadth doctrine. n547 The overbreadth doctrine, as the Court conceptualizes it, purports to create a special, bonus right with respect to laws regulating speech. "Outside the area of free speech, a litigant merely has the right to challenge the application of a rule to himself. However, in the area of free speech, the litigant has the bonus right - a right he can invoke, even if his as-applied challenge fails - that the reviewing court facially invalidate a rule which is substantially overbroad." Or so the standard conceptualization goes. As the Court has explained:

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n547. See supra notes 470-91 and accompanying text (describing overbreadth doctrine, and citing leading cases and scholarly articles).

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The First Amendment doctrine of overbreadth was designed as a "departure from traditional rules of standing," to enable persons who are themselves unharmed by the defect in a statute nevertheless "to challenge that statute on the ground that it may conceivably be ap [*159] plied unconstitutionally to others, in other situations not before the Court." ...

It is not the usual judicial practice ... to proceed to an overbreadth issue unnecessarily - that is, before it is determined that the statute would be valid as applied.... The lawfulness of the particular application of the law should ordinarily be decided first. n548

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n548. Board of Trustees v. Fox, 492 U.S. 469, 484-85 (1989) (citations omitted) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 610, 613 (1973)) . For a similarly clear description of the right to raise a First Amendment overbreadth challenge as a bonus right, additional to the claimant's right to raise an as-applied challenge, see Renne v. Geary, 501 U.S. 312, 323-24 (1991). And what Fox and Geary say explicitly is implicit in other standard discussions by the Court of the overbreadth doctrine. See, e.g., Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) ("In [overbreadth] cases, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned [i.e., who lacks a successful as-applied challenge] is permitted to challenge a statute on its face because it also threatens others not before the court ....").

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But the overbreadth doctrine is just as empty as the idea of an as- applied challenge, and for the same reason. Every constitutional claimant has one and the same type of legal right: a right to secure the invalidation (whether a partial invalidation, a facial invalidation, or something else) of a rule that

goes morally awry. This is the kind of right that the overbreadth doctrine purports to describe, but it is not in fact special to free speech, nor is it a bonus above and beyond a more basic as-applied right. Consider our stylized case, Child Pornography, which is meant to exemplify a classic overbreadth case: the case where a child pornographer is sanctioned pursuant to a sweeping rule that prohibits pictures of naked children. It is indeed true in Child Pornography that the claimant has no as-applied claim; moral reason does not obtain for a court to invalidate the claimant's sanction, independent of further invalidating the rule under which that sanction falls. But the same, I have argued, is true of the claimants in Flag Desecration, Abortion, Residential Picketing, Alcohol, and Animal Sacrifice. And if the Derivative Account is correct, the same is always true (or might be true) of every constitutional litigant. A constitutional litigant always lacks, or might lack, a valid moral claim; the strength of the litigant's own moral claim is simply not an issue for the constitutional reviewing court; and therefore the idea of a special overbreadth right, for litigants whose own moral claims misfire, is nonsense.

Indeed, I am not the first scholar to criticize the standard conceptualization of overbreadth. Henry Monaghan, in his well-known article on Overbreadth, has done just this. n549 Monaghan argues that laws regulating free speech, just like other rules, are unconstitu [*160] tional if and only if they fail applicable rule-validity schemas. n550 In the area of free speech, the relevant schema simply demands that the rule be narrowly tailored or (equivalently) that it not be overbroad. There is no special overbreadth doctrine for free speech, above and beyond the basic requirement - true both of rules regulating speech and of other rules - that such rules be constitutionally valid.

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n549. See Monaghan, supra note 44.

n550. As Monaghan puts it:

[There is] little support for viewing overbreadth as a special, speech-protective standing doctrine. Rather, ... overbreadth methodology simply applies the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule. What is different from the conventional run-of-the mill case is not standing but the substantive content of the applicable constitutional law.

Id. at 37.

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The dominant idea [overbreadth] evokes is serious means scrutiny. Wherever [the Constitution] mandates strict or intermediate scrutiny, a requirement of regulatory precision is involved .... Thus the Court has reacted interchangeably to "overbreadth" and "least restrictive alternative" challenges both inside

and outside the First Amendment context. n551

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n551. Id. (footnotes omitted).

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Like Monaghan, I agree that constitutional adjudication always and only involves judicial assessment of the predicate and history of rules against applicable rule-validity schema. Unlike Monaghan, I think it is a grave mistake to conceptualize this judicial task as resting upon the proposition that, in his words: "[A] litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." n552 This is the proposition that the Direct Account tries to prove: the Direct Account tries to demonstrate that sanctioning some X, pursuant to a rule that is constitutionally "invalid," violates X's moral rights. But the Direct Account is unpersuasive - rule-validity schema are not best construed as identifying improper features of rules such that to apply a rule with that kind of feature is, itself, to violate a moral right of the sanctioned person, independent of the proscribability of her action under another description - and to attempt a rescue of Monaghan's claim by saying that a litigant has the legal, if not moral, right to be judged in accordance with a constitutionally valid rule of law is a confusion. A litigant has that legal right only because, in turn, her case is an occasion for judicial repeal or amendment of the rule rather than merely the litigant's own treatment.

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n552. Id. at 3; see also Henry Monaghan, Harmless Error and the Valid Rule Requirement, 1989 Sup. Ct. Rev. 195, 196-97 (reiterating claim that litigant has the right to be judged in accordance with a constitutionally valid rule); Dorf, supra note 38, at 242-49 (concurring in Monaghan's claim); Fallon, supra note 83, at 874 (same).

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[*161] In short, the overbreadth doctrine is quite correct (pace Monaghan) in stating that the role of reviewing courts is to repeal and amend rules at the instance of morally minimal litigants. Where the overbreadth doctrine goes wrong is in thinking that this is a special role, reserved for the Free Speech Clause, and that the ordinary role of reviewing courts outside the area of free speech is something other than this.

Is there any way to salvage the overbreadth doctrine? Perhaps it might be reconceptualized, not as a doctrine that confers bonus rights upon litigants in the area of free speech, but as a special remedial doctrine - a doctrine that makes facial invalidation an especially accessible remedy here.

A Reconceptualized Overbreadth Doctrine?

If a law fails a rule-validity schema, except for a free-speech schema, then facial invalidation is an appropriate remedy under conditions Q. If, however,

a law fails a free speech rule- validity schema, then facial invalidation is an appropriate remedy under conditions Q or Q<prime>. n553

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n553. Cf. Stern, supra note 414, at 82-106 (describing, circa 1937, Court's varying practices of facial versus partial invalidation, and discussing the choice between those alternatives as a remedial problem).

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But even this remedial reconceptualization of overbreadth is problematic, given the Court's actual remedial practices. In practice, many and perhaps most of the cases in which the Court has sustained constitutional challenges to conduct-regulating rules have eventuated in facial invalidation: not just free speech cases, but also abortion rights cases, free exercise cases, and equal protection cases. n554 And, even more strikingly, the overwhelming bulk of the cases where the Court has cured invalid conduct-regulating rules through some remedy other than facial invalidation, have in fact been free speech cases! n555 The partial invalidation or, for that matter, the extension of conduct-regulating rules that violate equal protection is virtually unheard of; n556 now that the Free Exercise Clause closely parallels the Equal Protection Clause, the same should generally hold true there; and, in practice, as I have already noted, the standard remedy for conduct-regulating rules that violate substan [*162] tive due process has been facial invalidation. n557 So a remedial reconceptualization of First Amendment overbreadth is, at the very least, quite problematic.

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n554. See supra note 425.

n555. See supra note 425. Notably, these include not just commercial-speech cases, where the overbreadth doctrine is formally inapplicable, see Board of Trustees v. Fox, 492 U.S. 469 (1989), but "core" speech cases as well.

n556. See supra note 144.

n557. The standard response in abortion cases, which have comprised the bulk of substantive due process cases with respect to conduct-regulating rules, has been facial invalidation. See supra note 539. In other types of substantive due process scenarios, the Court has resorted to partial invalidation. See Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down law prohibiting contraception, with respect to use of contraceptives by married persons); Carey v. Population Servs. Intl., 431 U.S. 678 (1977) (striking down law restricting distribution and advertisement of contraceptives, with respect to nonprescription contraceptives).

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A third doctrine that - like the Salerno test for facial challenges and the First Amendment overbreadth doctrine - must be dramatically reconceptualized is the doctrine of jus tertii standing. n558 The Court has repeatedly invoked this doctrine in cases where a person who falls within the scope of a conduct-regulating rule seeks to invalidate the rule, even though that person

is not, or may not be, the moral beneficiary of the constitutional clause upon which he relies. For example, the doctrine was invoked in McGowan v. Maryland, n559 where department store employees were prosecuted for making sales in violation of a Maryland Sunday- closing statute, and challenged their convictions on free exercise grounds; n560 in Griswold v. Connecticut, n561 where doctors who prescribed contraceptives were sanctioned as "aider and abettors" pursuant to a Connecticut statute prohibiting the use of contraceptives, and challenged their sanctions on substantive due process grounds; n562 in Eisenstadt v. Baird, n563 where a distributor of contraceptives was sanctioned for violating a Massachusetts statute that prohibited their distribution (not their use), and raised an equal protection challenge; n564 and in Craig v. Boren, n565 where the statute prohibited the sale of low-alcohol beer to men but not to women [*163] between the ages of eighteen and twenty-one, and a beer vendor challenged the statute on equal protection grounds. n566

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n558. See generally Henry P. Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984) (discussing jus tertii standing doctrine); Robert Allen Sedler, The Assertion of Constitutional Jus Tertii: A Substantive Approach, 70 Cal. L. Rev. 1308 (1982) (same); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974) (same).

n559. 366 U.S. 420 (1961).

n560. See McGowan, 366 U.S. at 429-30 (holding that employees lacked jus tertii standing with respect to free exercise challenge).

n561. 381 U.S. 479 (1965).

n562. See Griswold, 381 U.S. at 481 (holding that doctors had jus tertii standing).

n563. 405 U.S. 438 (1972).

n564. See Eisenstadt, 405 U.S. at 443-46 (holding that distributor had jus tertii standing); see also Carey v. Population Servs. Intl., 431 U.S. 678, 682-84 (1977) (holding that distributor had jus tertii standing to challenge statute restricting distribution and advertisement of contraceptives).

n565. 429 U.S. 190 (1976).

n566. See Craig, 429 U.S. at 192-97 (holding that vendor had jus tertii standing). The doctrine also arises in areas other than substantive challenges to conduct-regulating rules. For recent examples, see Miller v. Albright, 118 S. Ct. 1428, 1442 (1998) (O'Connor, J., concurring) (arguing that child lacked jus tertii standing to raise equal protection claim of citizen father with respect to naturalization scheme distinguishing between the children of citizen fathers and citizen mothers); Campbell v. Louisiana, 118 S. Ct. 1419, 1422-24 (1998) (holding that white criminal defendant had jus tertii standing to raise equal protection claim of discrimination against blacks in the selection of grand jurors).

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The Court has conceptualized these kind of cases as posing a question of prudential (not Article III) standing: n567 Did the employee in McGowan, the doctor in Griswold, the distributor in Eisenstadt, and the vendor in Craig have "third party" standing to raise the constitutional rights of, respectively, the department store patrons, the doctor's patients, the distributees of contraceptives, and the vendor's customers? As the Court explained in Craig:

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n567. On the prudential, rather than constitutional, nature of jus tertii standing doctrine, see, e.g., Craig, 429 U.S. at 193 (stating that "limitations on a litigant's assertion of jus tertii are not constitutionally mandated, but rather stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative").

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The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory [command], thereby incurring a direct economic injury ... or to disobey the statutory command and suffer ... "sanctions and perhaps loss of license." This Court repeatedly has recognized that such requirements establish the threshold requirements of a "case or controversy" mandated by Art. III.

As a vendor with [Article III] standing to challenge the lawfulness of [the statute prohibiting the sale of beer, she] is entitled to assert those concomitant rights of third parties that would be "diluted or adversely affected" should her constitutional challenge fail and the statutes remain in force. Otherwise, the threatened imposition of governmental sanctions might deter [the vendor] from selling 3.2% beer to young males, thereby ensuring that "enforcement of the challenged restriction ... would result indirectly in the violation of third parties' rights." n568

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n568. 429 U.S. at 194-95 (citations omitted) (quoting Griswold v. Connecticut, 381 U.S. 479, 481 (1965)).

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The Court concluded that the vendor had "standing to raise relevant equal protection challenges to Oklahoma's gender-based law." n569

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n569. 429 U.S. at 197.

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But if the Derivative Account is correct, cases such as Craig, Eisenstadt, Griswold, and McGowan do not create a standing problem - any more than, say, R.A.V. n570 (where a trespassory and as [*164] saultive speaker was prosecuted pursuant to a no-hate-speech law) or Eichman n571 (where flag burners who took and destroyed flags belonging to others were prosecuted for flag mutilation). In what sense is the vendor in Craig, and her counterparts in Eisenstadt, Griswold, and McGowan, relying on the "rights" of other persons, rather than "her own" rights? If "rights," here, are taken to be moral rights, then the fact that the vendor and her counterparts are not asserting their own moral rights is not distinct to these cases. Rather, as I have argued at length, the morally derivative cast of constitutional litigants is a pervasive feature of constitutional law. What about saying that the vendor and her counterparts are not asserting their own legal rights? This, too, would be a mistake, because if the statutes in Craig, Eisenstadt, Griswold, and McGowan do indeed violate constitutional rule-validity schema, there is no reason to think that (morally-minimal) litigants other than the persons sanctioned pursuant to those statutes should have the primary legal right to secure the statutes' invalidation.

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n570. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

n571. See United States v. Eichman, 496 U.S. 310 (1990).

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In short, the issue in Craig, Eisenstadt, Griswold, and McGowan is simply an issue about the content of constitutional rule-validity schema. Does the substantive component of the Due Process Clause merely proscribe a rule that prohibits the use of contraceptives, or does it also proscribe a rule that prohibits the sale of contraceptives? Does the Equal Protection Clause proscribe rules that discriminate, not on the basis of the actor's race or gender, but rather on the basis of the race or gender of the actor's customers or clients? These are important questions, that go to the content of the moral criteria set forth in the Bill of Rights, and to the role of courts in enforcing these criteria - but the questions have nothing to do with jus tertii standing. Framing them in "standing" terms threatens to obscure their correct answers - for example, by suggesting that the vendor in Craig and her counterparts in Eisenstadt, Griswold, and McGowan can only proceed to court if the "rights-holders" they purportedly represent are unable to do so themselves. n572 On the Derivative Account, there is no better litigant to [*165] challenge a law prohibiting sale, prescription, or distribution, than a vendor, doctor, or distributor.

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n572. See, e.g., Campbell v. Louisiana, 118 S. Ct. 1419, 1423 (1998) (stating that the preconditions for jus tertii standing are " 'injury in fact' " on the part of the claimant, a " 'close relationship' " between her and the rights-holders, and "some hindrance to [their] asserting their own rights"); Eisenstadt v. Baird, 405 U.S. 438, 446 (1972) (stating that "the case for according standing to assert third-party rights is strong[ ] ... because

unmarried persons denied access to contraceptives in Massachusetts ... are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights"); McGowan v. Maryland, 366 U.S. 420, 430 (1961) (denying jus tertii standing to employees because "those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights"); Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 195 (4th ed. 1996) (noting that existence of "obstacles to third parties' asserting their own rights" is a recurrent theme in jus tertii case law).

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What about Article III standing itself? The Article III standing requirement, as the Court announced in the leading case of Allen v. Wright, n573 is the following: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." n574 Here, too, the Derivative Account has important implications. There is no inconsistency between that account and the existence of an Article III standing requirement. One might say, for example, that it is important to have litigants with interests sufficiently affected by the rules they challenge, so that these persons are likely to litigate with full vigor their claims that the challenged rules do not satisfy applicable rule-validity schema. n575 Crucially, however, as I have already noted, n576 a standing requirement is extrinsic to the Derivative Account. Constitutional adjudication, intrinsically, involves the repeal or amendment of rules, and X's "constitutional right" is a legal right to secure the invalidation of an invalid rule; it is no entailment of such a right that, further, X have a personal interest in that invalidation. X could just be a concerned citizen. By contrast, on the Direct Account, X's "constitutional right" is a legal right to secure the invalidation of her own treatment; if she fails to identify some such treatment, some "personal injury," then a necessary condition for the very practice of constitutional adjudication has failed. n577 The notion of standing is intrinsic to the Direct Account, but not the Derivative Account, and this difference means that the proponents of the two accounts are likely to flesh out Allen's standing requirement in quite different ways.

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n573. 468 U.S. 737 (1984).

n574. Wright, 468 U.S. at 751.

n575. Cf. Sunstein, supra note 525, at 1448 (noting that a standing requirement has been defended, inter alia, as ensuring sincere and effective litigants, but denying that such a requirement is well-matched to that goal).

n576. See supra text accompanying note 405.

n577. For discussions by the Court that link the injury-in-fact, causation, or redressability components of standing to the (allegedly) personal nature of adjudication, see, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992); Wright, 468 U.S. at 759-61; Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37-39 (1976); Warth v. Seldin, 422 U.S. 490, 498-99 (1975).